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No. A-63

Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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September 2, 1980

## QUESTION PRESENTED FOR REVIEW

Whether sex-based wage rate discrimination claims are subject to a different standard of proof, when such claims are asserted under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-1 to 2000e-17 (1976), than the equal pay for equal work standard applicable to claims presented under the Equal Pay Act, 29 U.S.C. §206(d)?

## PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are listed in the caption to this petition. The Complaint filed in the district court named Captain Stan Freese and Sergeant Clarence Ramseth as defendants, in their capacities as Washington County Police Officers, but they were dismissed as defendants from the suit by stipulation in the district court proceeding.

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Respondents.

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# PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners pray for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

## OPINIONS BELOW

The opinion of the court of appeals is reported at 602 F.2d 882 and appears in the Appendix hereto (20a-56a). The court of appeals supplemental opinion on denial of rehearing (1a-19a) is not yet officially reported, but is unofficially reported at 22 F.E.P. Cases 1650. The court of appeals' judgment reverses in pertinent part the decision of the United States District Court for the District of Oregon (57a-76a) which is not yet officially reported, but is unofficially reported at 20 F.E.P. Cases 788.

## JURISDICTION

The judgment of the court of appeals was entered on August 16, 1979. The court of appeals' order denying the petition for rehearing and suggestion for rehearing in banc was filed on May 1, 1980. On July 21, 1980, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to September 2, 1980. The jurisdiction of this Court is invoked under 28 U.S.C.

§1254(1).

## STATUTES INVOLVED

The statutes involved are: Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d)(1); Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 255, 42 U.S.C. §2000e-2(a)(1) and Section 703(h) of Title VII, 78 Stat. 255, 42 U.S.C. §2000e-2(h) (the second sentence of which is known as the "Bennett Amendment"). These statutes are set forth in the appendix hereto (79a-81a).

## STATEMENT OF THE CASE

The respondents are females who were employed as Matrons to guard female prisoners in the Washington County, Oregon jail. Males were employed as "Corrections Officers" to guard male prisoners at the jail.[1] The respon-

[1] The district court found that (cont.)

dents alleged in the Complaint that the County of Washington (the "County") had discriminated against them with respect to wages in violation of Title VII because the Matron job was assertedly substantially equal to the higher paid Corrections Officer job performed by the men jailers.[2] At trial in the district court proceeding the respondents contended that even if the Matron job was not equal to the Corrections Officer job, the County violated Title VII because the differences in pay were greater than the differences in the difficulty of the work. The County took

(cont.) Corrections Officer job was available to females but that none of the matrons had applied for the job. (68a).

[2] The district court held that it had jurisdiction of the suit under Title VII (58a). In addition to their alleged wage rate discrimination claim, the respondents also claimed that the County in violation of Title VII had terminated and refused to rehire them because they had sought equal pay. The district court found in favor of the County with respect to those claims (68a) and the court of appeals affirmed (28a). This petition refers only to the respondents' alleged wage rate discrimination claim.

the position that wages had been established through collective bargaining, the Matron job and the Corrections Officer job were not substantially equal and relief on the wage rate allegations was barred in the absence of proof that women had been paid less for performing equal work in relation to the men (61a,67a).

After trial, the district court held by virtue of 42 U.S.C. §2000e-2(h) (the Bennett Amendment, set forth in the appendix at 80a) that "the sex discrimination prohibitions of Title VII must be construed in the same manner as the Equal Pay Act" (79a). Accordingly, the district court applied to the respondents' alleged wage rate discrimination claim the Equal Pay Act's "equal pay for equal work" standard, 29 U.S.C. §206(d). The district court found that the Matron job was not substantially equal to the Corrections Officer job since the matrons had comparatively few prisoners to guard and actually spent a considerable portion of their work time performing clerical tasks (68a). Thus, the district court denied respondents' claim that the jobs at issue should have

been paid equally and also dismissed respondents' claim that the Matron job should have been accorded a higher pay rate even if it was not substantially equal to a job performed by men (70a).[3]

The court of appeals held that the district court was correct in finding that the comparison jobs were not substantially equal (28a). However, the court of appeals decided that even though respondents could not satisfy the "equal work" standard they should be permitted to show that they were entitled to higher pay under some other, unspecified standards. Accordingly, the court of appeals reversed the dismissal of respondents' alleged wage rate claim and ordered the district court on remand to consider respondents' allegation "that a portion of the discrepancy between their salaries and those of the

3 The district court explained:

> "If the jobs are substantially dissimilar that is the end of the inquiry. See 29 C.F.R. §800.120 (1965). Under these circumstances, the overpayment of corrections officers or the underpayment of matrons are not matters which I can explore or correct." (70a)

male guards could be be ascribed only to sex discrimination." (39a). In the Supplemental Opinion On Denial Of Rehearing the court of appeals indicated that if female employees could show a violation of the equal pay for equal work standard they could prevail under Title VII. but if they couldn't show equal work then they still might obtain recovery under other unspecified theories. (18a).

## REASONS FOR GRANTING THE WRIT

The judgment of the court of appeals below is in direct conflict with the decisions of the Fourth, Fifth, Eighth, Tenth and District of Columbia Circuits holding that sex-based wage discrimination claims that do not meet the Equal Pay Act's equal pay for equal work standard are not subject to relief under Title VII because (i) the Equal Pay Act and Title VII are to be construed in pari materia in the area of alleged sex-based wage discrimination and (ii) Congress intended the Equal Pay Act's equal work standard to apply to claims

of sex-based wage rate discrimination filed under Title VII as reflected in the Bennett Amendment to Title VII, 42 U.S.C. §2000e-2(h). Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. April 21, 1980), petition for cert. filed, 49 U.S.L.W. 3031 (U.S. July 18, 1980) (No. 80-82); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971); Stastny v. Southern Bell Telephone and Telegraph Co., ____ F.2d____ (4th Cir. July 28, 1980) (opinion printed in BNA Daily Labor Report dated August 13, 1980 at D-1); Orr v. MacNeill & Son, 511 F.2d 166 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1978); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

The judgment below is also in conflict with this Court's decision in General Electric Co. v. Gilbert, 429 U.S. 125, 144 (1976), holding that because of the Bennett Amendment the Federal Wage and Hour Administrator's interpretations of the Equal Pay Act's core equal pay for equal work standard are applicable for determining whether

compensation practices are lawful under Title VII. Furthermore, the court below decided the case in a way in conflict with this Court's decisions regarding in pari materia statutory construction in Train v. Colorado Pub. Int. Research Group, Inc., 426 U.S. 1 (1976) and United States v. United Continental Tuna Corp., 425 U.S. 164 (1976), since the court of appeals' statutory construction of the Bennett Amendment effectively repeals the Congressional judgment reached in the Equal Pay Act without any Congressional intent supporting that result.

The court of appeals' judgment is incorrect as shown by the text of the Bennett Amendment, the legislative intent underlying the Equal Pay Act and Title VII, principles of in pari materia statutory construction, the contemporaneous interpretation of the Bennett Amendment issued by the Equal Employment Opportunity Commission, and the well reasoned decisions of this Court, five court of appeals and numerous district courts.

Finally, the court of appeals has decided an extremely important

question of federal law which has not been, but should be, directly settled by this Court. If Title VII wage rate discrimination claims do not have to meet the Equal Pay Act's equal work standard, the federal courts will be overwhelmed by litigation having enormous financial consequences and calling for massive re-evaluation of private and public employers' wage structures. For pay purposes, the nurse will seek to be compared to the doctor, the school teacher to the school principal, the hand assembler to the lathe operator, and so forth in endless comparisons of different jobs. Moreover, once the courts go beyond the equal work standard, the question will no longer be confined to whether jobs should be paid the same, but will involve, as in this case, how much more a lower-paying job should be paid in relationship to a higher-paying, different job. The federal courts have no experience or expertise in such job evaluation and the whole process would be contrary to Congressional intent to limit the courts' involvement in the wage area to claims concerning equal work.

## I. THE DECISION BELOW IS IN DIRECT CONFLICT WITH THE DECISIONS OF FIVE COURTS OF APPEALS ON THE SAME MATTER

The Fourth, Fifth, Eighth, Tenth and District of Columbia Circuits have held, in direct conflict with the Ninth Circuit's decision in this case, that a Title VII plaintiff does have the burden of proving the performance of equal work for unequal pay in order to establish a prima facie case of sex-based wage discrimination. Stastny v. Southern Bell, supra, ____ F.2d at ____; Orr v. MacNeil & Son, supra, 511 F.2d at 171; DiSalvo v. Chamber of Commerce, supra, 568 F.2d at 596-97; Lemons v. City and County of Denver, supra, 620 F.2d at 229-30; Ammons v. Zia Co., supra, 448 F.2d at 120; Laffey v. Northwest Airlines, supra, 567 F.2d at 446.[4] The decisions in Lemons, Ammons, DiSalvo, Laffey, Orr and Southern Bell

[4] Additionally, the Sixth Circuit has affirmed a district court decision in accord with the above decisions in Lemons, Ammons, DiSalvo, Laffey, Orr and Southern Bell. See, Calage v. University of Tennessee, 400 F. Supp. 32, 37-39, (E.D. Tenn. 1975), aff'd, 544 F.2d 297 (6th Cir. 1976).

all conclude that Congress intended by virtue of the Bennett Amendment to incorporate the Equal Pay Act's equal work standard into Title VII as a limitation on sex-based wage discrimination claims.[5]

The court of appeals in this case reasoned that two interpretations of the Bennett Amendment were "plausible": (1) that the Bennett Amendment

[5] Numerous district courts, including district courts in the First, Second, Fourth, Sixth and Seventh Circuits, have also held that alleged sex-based wage discrimination claims which do not meet the equal pay for equal work standard are barred under Title VII. E.g., EEOC v. Colby College, 439 F. Supp. 631 (D.Me. 1977), vacated and remanded on other grounds, 589 F.2d 1139 (1st Cir. 1979), Johnson v. University of Bridgeport, 20 F.E.P. Cases 1766, 1770 (D. Conn. 1979); IUE v. Westinghouse Electric Corp., 17 F.E.P. Cases 16 (N.D.W.Va. 1977); Kohne v. IMCO Container Co., 20 EPD 11,858 at 11,875-76 (W.D.Va. 1979); Calage, supra, 400 Supp. at 37-39; Chrapliwy v. Uniroyal, Inc. 458 F. Supp. 252 (N.D.Ind. 1977); United States v. City of Milwaukee, 441 F. Supp. 1371 (E.D. Wis. 1977); Cullari v. East-West Gateway Coordinating Council, 457 F. Supp. 335, 341 (E.D.Mo. 1978). These district court decisions also conflict with the decision of the Ninth Circuit herein.

incorporated into Title VII all of 29 U.S.C.§206(d), including the Equal Pay Act's equal work standard; or (2) that the Bennett Amendment only incorporated into Title VII that portion of 29 U.S.C. §206(d) referring to the Equal Pay Act's affirmative defenses. (33a) The court of appeals herein held that the latter interpretation of the Bennett Amendment was "more persuasive" and determined that Title VII plaintiffs alleging sex-based wage discrimination claims are not limited to the equal work standard applicable under the Equal Pay Act. (33a).

Only the Third Circuit Court of Appeals has interpreted the Bennett Amendment in the same fashion as the Ninth Circuit. See, International Union of Electrical, Radio and Machine Workers v. Westinghouse Electric Corp., ____ F.2d ____, 23 F.E.P. Cases 588 (3d Cir. August 1, 1980). Judge Van Dusen's dissent to the Westinghouse majority opinion emphasizes the significance of the conflict between the Third and Ninth Circuits on the one hand and the Fourth, Fifth, Eighth, Tenth and District of Columbia Circuits on the other by demonstrating that the latter interpretation

of the Bennett Amendment permits claims based upon subjective evaluation of dissimilar jobs.

This Court should grant the writ of certiorari to resolve the conflict in the law created by the decision below.[6] It is doubtful that the con-

[6] In its Supplemental Opinion on Denial of Rehearing the court of appeals in the present case made no attempt to distinguish its decision from the Tenth Circuit's decision in Lemons, supra, the Eighth Circuit's decision in DiSalvo, supra, or the District of Columbia Circuit's decision in Laffey, supra. The court of appeals did attempt to distinguish the Tenth Circit's decision in Ammons, supra, and the Fifth Circuit's decision in Orr, supra, but the attempted distinction is not persuasive. The Ninth Circuit reasoned that the alleged claims in Ammons and Orr were "equal pay-type claims" requiring an analysis under Equal Pay Act standards, (12a-14a). However, the Ninth Circuit failed to acknowledge the fact that the claims in both Ammons and Orr contained elements of "intentional" discrimination. Thus, the court of appeals' assumption that because the Tenth and Fifth Circuits applied the equal work standard, the claims must have been equal pay-type claims does not withstand scrutiny. The wage claims were rejected in Ammons and Orr because plaintiffs were not asserting, and could not assert, violations of the equal work standard. Ammons, supra, at 119; (cont.)

flict will be resolved absent review by this Court. There is no indication that the courts of appeals will adopt a consistent interpretation of the Bennett Amendment. The Tenth Circuit's Lemons decision and the Fourth Circuit's Southern Bell decision, both in conflict with the instant decision, were issued after the Ninth Circuit reached its decision herein.[7] But then the Third Circuit issued its decision in the Westinghouse case which rejected the Tenth Circuit's

(cont.) Orr, supra, at 170-71. The Ninth Circuit also reasoned that certain of the conflicting district court decisions were "inconsistent" since the courts had applied the Equal Pay Act's equal work standard to Title VII wage claims but had not applied exemptions found in other statutory provisions of the Fair Labor Standards Act (which contains the Equal Pay Act). (14a-16a). However, the exemptions of the Fair Labor Standards Act are not contained in 29 U.S.C. §206(d) and, unlike §206(d), are not cited in the Bennett Amendment. This explains why the courts have applied the substantive equal work standard in §206(d) to Title VII wage claims but not the procedural provisions contained in other sections of the Fair Labor Standards Act.

7 Although the Lemons decision was issued April 21, 1980, and the decision denying rehearing herein was (cont.)

approach. 23 F.E.P. Cases at 598. Moreover, in this case a petition for rehearing and suggestion for rehearing in banc was denied by the Ninth Circuit, clearly indicating that the Ninth Circuit has no intention of reappraising its position and conforming to the view of the conflicting circuit court and district court decisions. Confusion over the proper standard to be applied to Title VII sex-based wage discrimination claims will spread unless this Court settles the question posed herein.

## II. THE COURT OF APPEALS DECIDED THE QUESTION IN A WAY IN CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT

The court of appeals' decision that

(cont.) issued May 1, 1980, it is probable that the Ninth Circuit rendered its decision prior to Lemons, supra. The plaintiffs in Lemons have filed in this Court a petition for writ of certiorari which notes that the Tenth Circuit's Lemons decision is in direct conflict with the decision of the Ninth Circuit in this case. See Petition for Writ of Certiorari filed in Lemons v. City and County of Denver, No. 80-82, at 7.

the Bennett Amendment only incorporated the Equal Pay Act's affirmative defenses into Title VII conflicts with this Court's decision in General Electric Co. v. Gilbert, supra. The plaintiffs in General Electric alleged that the exclusion of pregnancy and maternity from a disability benefit plan discriminated on the basis of sex in violation of Title VII and relied, inter alia, upon a 1972 EEOC guideline on the subject. But this Court found that because of the Bennett Amendment "interpretations of §6(d) of the Equal Pay Act are applicable to Title VII as well. . . ." 429 U.S. at 144. And, importantly, this Court then relied upon an interpretation of the Equal Pay Act's equal work standard in rejecting plaintiffs' claims. Id. at 144-45. Despite this evident conflict with the instant decision, the court of appeals did not discuss the Court's reliance in General Electric upon an interpretation of the equal work standard.[8]

[8] The court of appeals did refer to this Court's decision in Manhart v. City of Los Angeles Dept. of Power & Water, 435 U.S. 702 (1978), (12a). However,

Moreover, the Ninth Circuit's decision herein is contrary to this Court's decisions relating to statutory construction in United States v. United Continental Tuna Corp., 425 U.S. 164 (1976) and Train v. Colorado Pub. Int.

(cont.) the court of appeals admitted that the Manhart decision did not address the question of whether the Equal Pay Act's equal work standard applied to Title VII wage claims (12a). In Manhart, supra, this Court was not called upon to decide whether the Equal Pay Act's equal work standard had been incorporated into Title VII by the Bennett Amendment. There was no doubt in Manhart that the City required women to contribute more to the pension plan than men performing the same work. However, the City argued that its practice was protected by one of the Equal Pay Act's affirmative de- fenses because it was based on a "factor other than sex" -- the fact that women on the average live longer than men. This Court acknowledged that the Equal Pay Act's affirmative defenses had been incorporated into Title VII by the Bennett Amendment and then determined that the City's practice was not protected by one of the affirmative defenses. 435 U.S. at 711-13. But the Manhart decision is in no way inconsistent with the General Electric decision which indicates that the equal work standard as well as the affirmative defenses was incorporated into Title VII by the Bennett Amendment.

Research Group, Inc., 426 U.S. 1 (1976). In United Continental Tuna, thelower court had held that an amendment to the Suits in Admiralty Act allowed plaintiffs to sue the United States under that Act and ignore the applicable and more stringent Public Vessels Act. This Court rejected that construction of the Suits in Admiralty Act because it amounted to a repeal of the Public Vessels Act by implication without legislative history indicating that Congress intended that result. 425 U.S. at 169. Similarly, in Colorado Pub. Int. Research Group this Court rejected a construction of the Federal Water Pollution Control Act, 33 U.S.C. §1251 et seq., which would have substantially altered the regulatory scheme established under the Atomic Energy Act, 42 U.S.C. §2011 et seq., without express Congressional intent supporting that result. There, the Court held that a construction of the more recent statute was improper because it altered the policy of the earlier statutory scheme without a "clear indication of legislative intent". 426 U.S. at 24. In the instant case, the Ninth Circuit's con-

struction of the Bennett Amendment and Title VII repeals the Equal Pay Act by implication without any legislative history indicating that Congress intended to abandon the carefully developed equal work standard applicable to the wage discrimination area.

With respect to the Equal Pay Act, Congress spent eighteen months deliberating over the entire area of sex-based discrimination and decided to limit the involvement of government and the courts to claims meeting the equal work standard. In the 1963 debate on H.R. 6060, which contained the equal pay for equal work standard eventually adopted by Congress in the Equal Pay Act, Congressman Goodell, the sponsor of H.R. 6060, stated:

> "Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> "We do not expect the Labor Department people to go into an

establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear." 109 Cong. Rec. 9197.[9]

[9] Congressman Frelinghuysen stated that "the administration of the equal pay concept, . . . will not be excessive nor excessively wide ranging. What we seek is to insure, where men and women are doing the same job under the same working conditions, that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses." (Emphasis added) 109 Cong. Rec. 9196. See also the comments of Congressmen Griffin and Thompson, 109 Cong. Rec. 9197-98 (concerning examples of jobs that Congress intended not be compared for purposes of wage discrimination claims), and the comments of Congresswoman St. George and Congressman Landrum, 108 Cong. Rec. 14767-68 (1962) (concerning the views of the House in amending a 1962 equal pay proposal to provide for an "equal work" standard, rather than a "comparable work" standard).

Congressman Goodell also stated that it was "not intended that the Secretary of Labor or the Courts will substitute their judgment for the judgment of the employers." 109 Cong. Rec. 9209. Similarly, he said "[i]t is not the business of the Secretary of Labor to write job evaluation systems." Id. Accordingly, under the Equal Pay Act, Congress "did not authorize the Secretary or the Courts to engage in wholesale re-evaluation of any employer's pay structure in order to enforce their own conceptions of economic worth." Brennan v. Price William Hospital Corp., 503 F.2d 282, 285 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

There is no legislative indication that in enacting the Civil Rights Act of 1964 Congress intended to reject all of its work and to abandon the limitations it had just one year previously placed upon wage discrimination claims in which the federal courts were to become involved. As discussed above, the Senate and the House took measures to preserve the equal work standard in Title VII by adopting the Bennett Amendment. But the point here is that where

Congress has thoroughly deliberated and meticulously drafted a statute reflecting its judgment on a specific area, that judgment will control the interpretation of a more general later enactment absent a clear statement to the contrary in the subsequent statute. United Continental Tuna, supra; Colorado Pub. Int. Group, supra.

The Ninth Circuit's construction of Title VII herein authorizes an evasion of the policy and regulatory scheme of the Equal Pay Act and in effect repeals the Equal Pay Act by implication. However, since there is no Congressional intent authorizing Title VII plaintiffs to evade the Equal Pay Act and its standard, the court of appeals' construction of Title VII is in conflict with the decisions of this Court. United Continental Tuna, supra; Colorado Pub. Int. Research Group, supra.

## III. THE COURT OF APPEALS INCORRECTLY DECIDED THE QUESTION POSED FOR REVIEW

The court of appeals misconstrued the terms of the Bennett Amendment.

(3a-18a). The court of appeals reasoned that the use of the word "authorized" literally meant that the Bennett Amendment only incorporated the Equal Pay Act's affirmative defenses because the Equal Pay Act "'authorizes' a differential only where one of the four defenses is invoked" (9a). However, the court of appeals improperly selected a meaning for "authorized" that best suited its view of what the ultimate result should be, and disregarded other common meanings of the word and the legislative purpose for the Bennett Amendment. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404 (1945). "Authorized" also means "to permit a thing to be done in the future", Black's Law Dictionary (4th ed. 1968), at 169, and when the word is viewed under that meaning the Bennett Amendment "authorizes" differentials in pay in situations not involving equal work. Even if the term is limited to a meaning signifying express sanction or endorsement, the carefully considered decision of Congress to limit the application of the Equal Pay Act to circumstances involving equal work was a conscious authorization

of unequal pay in all circumstances involving unequal work, including the category of comparable work for which protection was rejected.

The court of appeals herein largely confined itself to the bare words of the statute and improperly ignored legislative history. Lynch v. Overholser, 369 U.S. 705, 710 (1962).[10] And although the Ninth Circuit did review some of the relevant Title VII legislative history, it misinterpreted the import of, or failed to accord sufficient weight to, the Congressional intent to incorporate the equal work standard into Title VII. For example, early in the Senate debate of H.R. 7152, Senator Clark, a floor manager of the bill, submitted a memorandum in the course of responding to objections that had been raised to the bill which the sponsors of the bill considered to be unfounded. One unfounded objection stated that H.R. 7152 did not include the limitation of the Equal Pay

10 The court of appeals did not discuss any of the legislative history of the Equal Pay Act which shows Congress' intent just one year prior to the passage of Title VII to limit broad inquiry by the courts in the wage area.

Act "with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut[s] across different jobs." 110 Cong. Rec. 7217 (1964). Senator Clark responded that "[t]he standards in the Equal Pay Act for determining discrimination as to wages of course, are applicable to the comparable situtation under Title VII." Id. (Emphasis added).[11]

The court of appeals incorrectly held that Senator Clark meant that when a Title VII plaintiff asserts an equal work claim, the equal work standard applies, but for claims not involving equal work, the equal work standard does not apply (17a-18a). Under the Ninth Circuit's analysis Senator Clark was agreeing that wage discrimination claims under Title VII would "cut across different jobs." But the purpose of Senator Clark's memorandum, as floor manager, was to reply to unfounded objections to the bill, not to raise objections he agreed with. In fact, Senator

11 The full text of the pertinent unfounded objection and Senator Clark's answer are set forth in the court of appeals' supplemental decision (6a-7a).

Clark was disagreeing with the objection and stating that Title VII would not allow claims which "cut across different jobs" because of its in pari materia relationship with the Equal Pay Act's equal work standard.

Moreover, the court of appeals misinterpreted Senator Bennett's comments. Senator Bennett offered his amendment because of his stated concern that perhaps not enough attention had been paid to potential conflicts between H.R. 7152 and the Equal Pay Act due to the "wholesale" insertion of the word "sex" in the bill. 110 Cong. Rec. 13647 (1964). Senator Bennett said: "[t]he purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified". Id. The court of appeals' interpretation of Senator Bennett's comments -- that Senator Bennett intended to incorporate only the Equal Pay Act's affirmative defenses into Title VII -- renders the Bennett Amendment meaningless since such affirmative defenses were already contained in H.R. 7152 in the first sentence of Section 703(h).[12] The court of appeals was

apparently unaware of the importance of the first sentence of §703(h) when it initially decided this case, but its subsequent discussion of the matter in the Supplemental Opinion denying rehearing is not persuasive.[13]

[12] The opening sentence of §703(h) already protected compensation which is based on a seniority system, a merit system or a system which measures earnings by quantity or quality of production. The fourth Equal Pay Act defense, a "factor other than sex," was already contained in the core provisions of Title VII (Section 703(a)) which make Title VII applicable only if there is discrimination on the basis of sex, 42 U.S.C. §2000e-2(a). Sections 703(a) and 703(h) of Title VII are set forth in the appendix hereto (80a).

[13] The court of appeals implied that it makes no difference whether the Bennett Amendment is rendered meaningless because nothing in §703(h) was meant to have a "substantive" effect on the anti-discrimination prohibitions of Title VII. (10a). That statement is clearly incorrect, as shown by this Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The court of appeals also ignored this Court's reliance on an interpretation of the equal work standard in General Electric, supra, which shows that the Bennett Amendment was intended to have a substantive effect. The Ninth Circuit's statement (10a) that the Bennett Amendment (cont.)

Cloture limited the time Senator Bennett had to introduce the Bennett Amendment. But he later clearly explained that the Bennett "amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359 (1965). At the time of Senator Bennett's more complete explanation of intent, Senator Dirksen stated that he, Senator Humphrey (a floor leader of H.R. 7152) and the Senate as a whole passed the Bennett Amendment in accord with Senator Bennett's understanding of the Amendment. 111 Cong. Rec. 13360 (1965). The court of appeals improperly failed to accord weight to these expressions of Congressional intent.[14]

(cont.) clarifies the inclusion of the affirmative defenses is not persuasive since the affirmative defenses had already been included by the first sentence of §703(h). Finally, the court's statement (11a) that the Bennett Amendment clarified the burden of proof in an equal pay-type case filed under Title VII is not supported by the Bennett Amendment or any legislative history.

14 The court of appeals would not rely on the 1965 statement of (cont.)

(5a-6a).

Additionally, the court of appeals erred with respect to Congressman Celler's interpretation of the Bennett Amendment. Congressman Celler, the original sponsor of H.R. 7152, provided the official and only explanation of the

(cont.) Senator Bennett because it was not contemporaneous with the passage of Title VII (5a-6a). However, Senator Bennett could not explain the Bennett Amendment when it was offered because of the invocation of cloture. And he did make his later statement shortly after the enactment of Title VII. This Court has accorded weight to non-contemporaneous legislative statements. E.g., Sioux Tribe v. United States, 316 U.S. 317, 329-330 (1942); Haynes v. United States, 390 U.S. 85 (1168). The Court's decision in Galvan v. Press, 347 U.S. 522 (1954), is incorrectly interpreted by the court of appeals (5a). Galvan supports the view that Senator Bennett's 1965 statement is entitled to great weight since he was the sponsor of the Amendment. In Galvan, supra, this Court relied upon a 1951 memorandum by Senator McCarran in interpreting the meaning of a 1950 statute he sponsored. 347 U.S. at 526-27. Accordingly, the court of appeals erred by not according weight to the 1965 statements of Senator Bennett and Senator Dirksen. (Senator Dirksen's 1965 statement was not even discussed by the court of appeals). Those statements make clear that the purpose of the Bennett Amendment was to incorporate the equal work standard into Title VII.

Bennett Amendment to the House by stating that the Bennett Amendment "[p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex -- section 703(b) [sec] [703(h)]".[15] 110 Cong. Rec. 15896 (1964). While the court of appeals recognized that Congressman Celler's explanation did not support its interpretation of the Bennett Amendment, it decided not to follow that clear statement of legislative intent "in view of the contrary or inconclusive legislative history previously discussed." (8a). However, as shown above, there is no contrary legislative history. Congressman Celler's explanation is entitled to great weight because (1) it was made by the sponsor of the legislation who obviously understood its provisions, including the amendments, and (2) the House passed the bill based on Congressman Celler's explanation of the bill. United States v. United Mine Workers,

15 The Equal Pay Act is contained in the Fair Labor Standards Act, 29 U.S.C. §206(d).

330 U.S. 258, 279-80 (1947); Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976).

The court of appeals also erred by misreading the EEOC's contemporaneous interpretation of the Bennett Amendment. In 1965, shortly after the Equal Pay Act and Title VII were enacted, the EEOC promulgated the following official guideline concerning the inter-relationship of the two laws (formerly codified at 29 C.F.R. §1604.7, quoted in pertinent part):

> "(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 205(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of equal pay for equal work set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibition in section 703, and is not limited by

> section 703(h) to those employees covered by the Fair Labor Standards Act." (Emphasis supplied).[16]

The court of appeals did not even discuss the key second sentence of the EEOC's 1965 guideline. The court of appeals also erred by interpreting the guideline to mean that the equal work standard only applies when a plaintiff alleges an equal pay violation under Title VII. (37a). However, by its terms the EEOC guideline applied to all types of compensation claims -- not just "equal pay-type claims" -- because the reference to th equal work standard "determining what is unlawful discrimination in compensation" is not limited in any way.[17]

16 The Commission later tried to modify this view in 1972 by issuing a new interpretation of the Bennett Amendment, see, 29 C.F.R. §1604.8, but the earlier guideline is entitled to greater weight since it was more contemporaneous with the passage of Title VII. General Electric, supra, 429 U.S. at 142.

17 The court of appeals' approach is fundamentally inconsistent. It held that the Bennett Amendment did not incorporate the equal work standard into Title VII. However, when confronted with authority such as Senator (cont.)

## IV. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW WHICH SHOULD BE SETTLED BY THIS COURT

The issue raised herein is considered to be extremely important by the government, employers and unions. The Chairwoman of the Equal Employment Opportunity Commission has stated that the issue is "the same kind of outsized issue that school desegregation was", the "most difficult issue to arise under Title VII" and the "women's issue of the 1980's". See BNA Daily Labor Report dated October 30, 1979, at A-2, A-3. At recent EEOC hearings, representatives of business, labor and public employers

(cont.) memorandum and the 1965 EEOC guideline, the court of appeals held that the equal work standard is applicable to Title VII, but only for equal pay-type claims (38a-39a). Moreover, the court of appeals held that the respondents had stated a claim under Title VII by alleging a pay disparity which obviously involved a comparison of two different jobs (39a). Yet, the court of appeals stated that the "effect of our decision will not be to substitute a 'comparable' work standard for an 'equal' work standard" (17a). These inconsistencies reveal confusion in the Ninth Circuit's reasoning requiring review by this Court.

stressed the importance of the standard of proof to be applied to Title VII sex-based wage discrimination claims.[18] Accordingly, the interest in the question raised in this petition goes far beyond the parties involved herein.

The decision below has enormous impact on the federal courts. In the instant case, the district court has been instructed to consider respondents' claim that the Matron job is discriminatorily underpaid when compared to the different Corrections Officer job allegedly because the pay differential between the jobs is greater than differences in difficulty between the jobs. (18a). Resolving such a claim would entail complex questions of job evaluation -- and would result in the district court imposing on the parties its conception of the economic value of the jobs.[19] This process would overburden

18 See BNA Daily Labor Report dated April 28, 1980 at A-14; BNA Daily Labor Report dated April 29, 1980 at A-5 to A-12 and BNA Daily Labor Report dated April 30, 1980 at A-8 to A-15.

19 See, Lindsay, Equal Pay (cont.)

the courts because the courts simply do not have the experience and expertise of employers and unions in the job evaluation area. Moreover, the decision below will result in numerous Title VII suits being filed, creating a significant burden on the courts not intended by Congress.[20]

(cont.) for Comparable Work: An Economic Analysis of a New Anti-discrimination Doctrine (1980), published by the Law and Economics Center of the University of Miami. Professor Lindsay cautions against the "[a]rbitrary mainipulation of wage rates" and reasons that governmental interference in the wage area could result in "counterproductive effects", such as an overall loss of jobs. Id. at 33-34. Moreover, Professor Lindsay concluded that "wage determination in different occupations is a complex, simultaneous process" and that "even in the absence of prejudice, and when performed under conditions of equal skill, effort, and responsibility, the real market value of dissimilar work can differ markedly." Id. at 3-4. The fact that wage rates depend on so many complex factors was one of the prime reasons for the creation of the equal work standard -- to limit federal involvement in the wage area except in equal work situations.

20 There already has been a substantial amount of Title VII wage discrimination litigation notwithstanding the fact that the courts have generally

The decision below also raises the possibility of enormous financial consequences to individual employers and the economy as a whole.[21] With respect to

(cont.) rejected claims not meeting the equal work standard. See the cases cited supra at 11 et seq., which represent only a portion of the suits alleging wage discrimination under Title VII. If the equal work standard would not apply as a limitation on Title VII sex-based wage discrimination claims, the amount of such litigation surely would increase.

21 In discussing these economic consequences, Fortune Magazine observed:

> There are two ways to correct the imbalance in earnings [between the sexes]. Women can step into higher-income jobs, a commendable process that is, of course, gradually taking place. But if the world could be changed by edict, there is a second method that would work much faster. Women could remain in their customary jobs and men in theirs and employers could be ordered to pay the same wages to all whose work is deemed to be of equal value.
>
> That would certainly correct imbalances rapidly, but the economy would surely be much disrupted in the process. At the extreme, to raise the aggregate pay of the country's (cont.)

the County and other local public employers dependent upon a limited tax base for sources of revenue, the potential financial impact of the federal courts adjusting wage rates under the court of appeals' novel approach in this case is very troublesome, particularly since this Court has not approved the court of appeals' approach herein.

## CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be granted.

Respectfully submitted
Lawrence R. Derr

(cont.) 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering $150 billion a year to civilian payrolls. Such a radical step, of course, seems too preposterous to be taken seriously . . . . "The EEOC's Bold Foray Into Job Evaluation," Fortune, September 11, 1978, 58-59.

# APPENDIX

Supplemental Opinion of the
Court of Appeals
(Decided May 1, 1980)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | |
|---|---|
| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs-Appellants, | No. 76-3448 |
| vs. | SUPPLEMENTAL OPINION ON DENIAL OF REHEARING |
| THE COUNTY OF WASHINGTON: SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants-Appellants. | |

Appeal from the
United States District Court
for the District of Oregon

Before: MERRILL and TANG, Circuit Judges and TAYLOR,* District Judge.

TANG, Circuit Judge:

After our opinion in this matter was filed, Gunther v. County of Washington, No. 76-3448 (9th Cir., filed August 16, 1979), the County petitioned for rehearing, and the Equal Employment Advisory Council (EEAC), an association representing the interests of employers submitted an amicus curiae brief in support. The County now argues that rehearing is necessary because the panel decided an important issue -- whether Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-1 - 2000e-17 (1976), may support a theory of sex-based wage discrimination that is not based on a denial of equal pay -- with minimal discussion of the issue by the parties. The County and the EEAC contend that the panel overlooked legislative history and case law that would have led it to conclude that discrimination in compensation on

*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

account of sex does not violate Title VII unless it also violates the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1970).

It is true that the parties inadequately presented this issue before the court. Nevertheless, the issue was raised at trial, decided by the district court, and raised on appeal. We are thus obliged to reach the issue. Nevertheless, we take this opportunity to address briefly the arguments made in the petition for rehearing.

I.

The County and the EEAC first contend that the panel overlooked significant legislative history of Title VII in resolving the meaning of the Bennett Amendment. Of the three short items of legislative history that they present, the one on which they most rely is the statement of Senator Bennett, the amendment's sponsor, in which he endorses the interpretation of the amendment that we rejected in Gunther. 111 Cong. Rec. 13359 (1965).

Senator Bennett's statement is an interesting piece of "legislative history." The Bennett Amendment was passed in 1964 as part of the original Civil

Rights Act. One year later, Senator Bennett inserted in the Congressional Record an excerpt from a law review article in which the article's author suggests that there are two conflicting interpretations of the Bennett Amendment (the same two recognized by the panel), plus a memorandum from his staff to clarify which interpretation Bennett believed to be the correct one. The memorandum concluded that "the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." Id.

Before inserting the article and the memorandum, Senator Bennett explained why he waited a year to explain what he really meant when he introduced his amendment. According to Senator Bennett, under the Senate rules then in effect he was allowed to introduce the amendment but was not allotted time to discuss it. Senator Bennett said that this

> resulted in action by the Senate without the creation of any legislative history. Thus, the Senate failed in its responsibility to give sufficient guidance to those in the executive

> branch and elsewhere to those who must interpret and apply the amendments adopted.
>
> As an example of what has occurred because of the confusion and near chaos that prevailed on those days, I find myself today under the necessity of trying to create legislative history that should have been created then.

As the amendment's sponsor, Senator Bennett's understanding of the amendment might have been entitled to some weight if it had been expressed contemporaneously with the passage of the legislation. See Galvan v. Press, 347 U.S. 522, 526-27 (1954). Coming one year after the Bennett Amendment was enacted, however, the statement at best reflects what was on Senator Bennett's mind when he introduced the amendment and is entitled to no weight. See Manhart v. Los Angeles Department of Power and Water, 553 F. 2d 581, 589 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978) (discussion occurrring "hours" after passage of Bennett Amendment is not part of amendment's legislative history). Either from a legal standpoint or as a

practical matter, Senator Bennett's statement cannot express what was on Congress' collective mind when it acted a year earlier. If Senator Bennett's "clarifying" statement has any significance, it must be as evidence that the amendment was ambiguous on its face and that its contemporaneous legislative history was not enlightening.

The second item of legislative history produced by the County and the EEAC also tends to support the panel's original interpretation. This consists of an answer by Senator Clark, a proponent of Title VII, to objections against the proposed legislation:

> Objection: The sex anti-discrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitations in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike title VII. Furthermore, under title VII, jobs can no longer be

> classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII.

110 Cong. Rec. 7217 (1964).

Senator Clark's response is entirely compatible with the court's opinion. Senator Clark's comment that the Equal Pay Act contained different coverage and numerous exemptions reflected an understanding that the Equal Pay Act was to operate separately and independently from Title VII. See Gitt and Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections under Title VII, 8 Log. 723, 746-48 (1977) (hereafter "Beyond the Equal Pay Act"). His comment that the Equal Pay Act standards are applicable to the "comparable situation" under Title VII is consistent with the panel's analysis of the Gunther plaintiffs' discrimination claims. When a discrimination claim is based on a theory that the plaintiffs are denied equal pay for equal work, Equal Pay Act standards are applicable.

See Gunther, No. 76-3448, slip op. at 4-7 (9th Cir. August 16, 1979)). When a claim of discrimination is not based on an equal work theory, it must be analyzed separately under Title VII.

Finally, the County and EEAC refer to a comment made by Representative Celler in explaining a number of amendments made by the Senate to Title VII:

> Provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex -- section 703(b).

110 Cong. Rec. 15896 (1964). Viewing this solitary comment in its most favorable light, we find that it is insufficient to establish the County's interpretation of the Bennett Amendment in view of the contrary or inconclusive legislative history previously discussed.

The County and the EEAC next refer to the statutory language of §703(h). They argue that, because the first sentence of § 703(h) contains three of the four affirmative defenses contained in the Equal Pay Act, an interpretation that the Bennett Amendment merely

incorporated the Equal Pay Act defenses into Title VII renders the amendment meaningless.

Initially, it bears emphasis that the language of the Bennett Amendment, allowing a wage differentiation if such differentiation is "authorized by the provisions" of the Equal Pay Act, almost compels the interpretation that the Bennett Amendment merely incorporate only the Equal Pay Act's defenses into Title VII. The Equal Pay Act applies only when a plaintiff has been denied equal pay for equal work, and "authorizes" a differentiation only where one of the four defenses is invoked. The Equal Pay Act does not "authorize" differentiations in the absence of equal work; in those cases, it simply does not apply. Read literally, the amendment only incorporates the Equal Pay Act's defenses. If Congress had intended to say that wage differentials do not violate Title VII unless they violate the Equal Pay Act, it could have easily said so.

With this in mind, the County's reliance on the defenses included in the first sentence of § 703(h) cannot, and

does not, alter the meaning of the words used in the Bennett Amendment itself. The County argues that the panel's interpretation had no substantive effect because three of the Equal Pay Act defenses were already included in Title VII. Yet the very inclusion of the three affirmative defenses in the first sentence of § 703(h) made no substantive alteration of Title VII. These defenses merely clarified Congress' intent that only discrimination on account of race, color, religion, sex, or national origin is forbidden by Title VII. See 110 Cong. Rec. 12722 (1964) (remarks of Sen. Humphrey). Similarly, the Bennett Amendment need not have effected a "substantive" change. It does not render the Bennett Amendment meaningless to say that it only incorporates the Equal Pay Act defenses, because the Bennett Amendment would still serve the purpose of clarifying Congress' intent with respect to the relationship of Title VII and the Equal Pay Act.

Moreover, the fact that the Bennett Amendment incorporated an Equal Pay Act defense -- the defense allowing differentiation based "on any other factor

other than sex" -- that is not contained in the first sentence of § 703(h) is significant. The incorporation of this Equal Pay defense into Title VII clarifies the burden of proof in an equal pay case brought under Title VII. Under the Equal Pay Act, the burden is on the employer to show that its practice falls within one of the four defenses. See Corning Glass Works v. Brennan, 417 U.S. 188, 196 (1974). The incorporation of the fourth affirmative defense into Title VII makes clear that once a Title VII plaintiff has shown that she was denied equal pay for equal work, the burden shifts upon the employer to prove that the differentiation was based on some factor other than sex.[1]

The County and the EEAC next contend that the panel ignored significant case law in arriving at its interpretation of the Bennett Amendment.

Although we look to the reasoning of other circuits and district courts for guidance, we are bound only by decisions rendered in this circuit. See Allstate Insurance Co. v. Stevens, 445 F. 2d 845. 846 (9th Cir. 1971). The only case

arising from this circuit that discussed the Bennett Amendment was Manhart v. City of Los Angeles Department of Water and Power, 553 F.2d 581 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978). Although the court did not address the present issue, it was obliged to address the Bennett Amendment and the Equal Pay Act affirmative defenses in the context of suit brought under Title VII to challenge a retirement plan. The court specifically noted, in discussing the Equal Pay Act's affirmative defenses, that "all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII." Id., 553 F.2d at 590. Although arising in a different context, the express language of this circuit cannot be readily disregarded. Nevertheless, discussion of case law in other circuits and district courts may be enlightening in showing the ambiguity and confusion that has often characterized consideration this issue.

The only appellate case that has specifically recognized the relationship between Title VII, the Equal Pay Act and

the Bennett Amendment is Christensen v. Iowa, 563 F.2d 353 (8th Cir. 1977). In Christensen, however, the majority opinion specifically declined to address whether Title VII plaintiffs had to prove a violation of the Equal Pay Act to succeed on their equal pay claims, finding that the plaintiffs had not established a prima facie case under Title VII. Id. at 355.

Other courts, although sometimes assuming or implying that a Title VII plaintiff could not succeed on her wage-discrimination claim unless she could prove a violation of the Equal Pay Act, have involved equal pay-type claims. See Orr v. MacNeill & Son, Inc., 511 .2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia, 448 F.2d 117 (10th Cir. 1971). These equal-pay type Title VII claims, of course, require analysis under Equal Pay Act standards. See Gunther, No. 76-3448, slip op at 4-7 (9th Cir. August 16, 1979). Although the panels in both Orr and Ammons appeared to assume that a Title VII plaintiff claiming wage discrimination could prevail only if she proved a violation of the Equal Pay Act,

in neither case did the court analyze the meaning of the Bennett Amendment and its effect on the relationship between the Title VII and the Equal Pay Act. See Gitt and Gelb, Beyond the Equal Pay Act at 752-55. This assumption that a Title VII plaintiff could prevail only by establishing an equal pay violation has been perpetuated in later cases involving only equal pay claims, where statements limiting the scope of Title VII were unnecessary to decide the case.

The failure of the courts to analyze the meaning of the Bennett Amendment and the relationship of the two acts has resulted in an inconsistent approach that underscores the ambiguity of the Bennett Amendment. If the Bennett Amendment really means, as the County contends, that a plaintiff claiming wage discrimination can succeed under Title VII only if the discrimination also violates the Equal Pay Act, then logically the Bennett Amendment should incorporate into Title VII not only the equal work formula of the Equal Pay Act, but also the Act's exemptions, employers, periods of limitations, and all other differences in coverage between

the acts.[2] Yet, not only have the courts and the County failed to articulate whether the Bennett Amendment incorporates the entire Equal Pay Act or just its equal pay formula, they have not even recognized that two extremely different formulations of their position exist.

Several of the district court cases cited by the County have exhibited this apparent inconsistency. For example, in Molthan v. Temple University, 442 F.Supp 448 (E.D. Pa. 1977), the district court considered equal pay claims under Title VII even though the claims would have been time-barred under the Equal Pay Act. In Howard v. Ward County, 418 F. Supp. 494, 503 (D.N.D. 1976), the court held that the plaintiffs could assert claims under Title VII even though, as public employees, they could not recover under the Equal Pay Act.

Indeed, the County's defense of this case suffers from the same inconsistency. The Gunther plaintiffs sued under Title VI because, during the time of their alleged discrimination, the Equal Pay Act did not apply to public employees. Gunther, No. 76-3448, slip

op. at 4 n.4 (9th Cir. August 16, 1976). Consistent with the position it now appears to advocate, the County should have moved to dismiss the plaintiff's suit on the ground that its conduct could not have violated Title VII because it did not violate the Equal Pay Act. The County's failure to do so reflects on the failure of the courts to analyze and articulate the meaning of the Bennett Amendment, as well as the ambiguous nature of the amendment itself. This court was certainly warranted in not following the inadequate analyses and assumptions perpetuated by other courts.

Finally, the County and the EEAC argue that the legislative history of the Equal Pay Act evidences Congress' intent carefully to establish standards against wage discrimination and that Congress could not have intended to disturb those standards when it hastily included sex in Title VII. This argument, however, cuts more forcefully in the other direction. The same Congress that enacted the Equal Pay Act enacted Title VII one year later. Thus, when the Congress included sex into

Title VII it was fully aware, from the previous year's hearings, of the employment problems of women. It may have believed that the Equal Pay Act by itself was inadequate to remedy sex discrimination, or that broader protections were necessary. See Gitt and Gelb, Beyond the Equal Pay Act at 744-45.

In any event, our interpretation of the Bennett Amendment in Gunther does not "nullify" the provisions of the Equal Pay Act. The County and the EEAC emphasize that Congress, in adopting the Equal Pay Act, rejected "comparable" work standard. The effect of our decision will not be to substitute a "comparable" work standard for an "equal" work standard. Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. In most cases, an equal work theory will provide the most practical method of

establishing a prima facie case of wage discrimination. All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible. We do note that, because a comparable work standard cannot be substituted for an equal work standard, evidence of comparable work, although not necessarily irrelevant in proving discrimination under some alternative theory, will not alone be sufficent to establish a prima facie case.

The Gunther plaintiffs apparently presented evidence of intentional sex discrimination that was not considered by the district court because the district court believed that disposition of the equal pay claims was the end of the inquiry. It is unclear from the record whether the plaintiffs were prevented from presenting other evidence that might have established a claim of sex discrimination. Because of the district court's familiarity with this case, the extent of the further proceedings needed to consider the plaintiffs'

alternative claims, such as the need for an evidentiary hearing, is committed to its discretion.

The petition for rehearing is denied.

FOOTNOTES

[1]For example, even if an employer could show that a sex classification was justified as a bona fide occupational qualification under Title VII, see 42 U.S.C. § 2000e-2(e), the employer might still be liable for a discriminatory wage differential if unable to prove that the differential was the result of any other factor other than sex. See Sullivan, The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case, 31 Ark. L.Rev. 545, 547 n.14 (1978).

[2]For example, the Fair Labor Standards Act exempts numerous employees from coverage under its provisions, see 29 U.S.C. § 213; no similar exemptions are contained in Title VII; see also Sullivan, The Equal Pay Act of 1963: Making and Breaking a Prima Facie Case, 31 Ark. L.Rev. 545, 546 n. 9-13 (1976).

Opinion of the Court of Appeals
(Decided August 16, 1979)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

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| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs-Appellants, | ) | No. 76-3448 |
| vs. | ) | OPINION |
| THE COUNTY OF WASHINGTON: SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants-Appellants. | ) | |

Appeal from the
United States District Court
for the District of Oregon

Before: MERRILL and TANG, Circuit Judges and TAYLOR,* District Judge.

TANG, Circuit Judge:

*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

Plaintiffs Alberta Gunther, Velene Vallance, Marion Vanderzanden, and Yvonne Hatton were four women employed as jail matrons[1] at the Washington County (Oregon) jail. The plaintiffs guarded the inmates in the female section of the county jail; males were employed at a higher rate of pay to guard the inmates in the male section. The jobs of the plaintiffs and two other matrons, Dorothy Holiday and Donna Firth, were terminated when the County decided to move the women prisoners into a facility in an adjacent county.

The plaintiffs sued the County Sheriff Warren Barnes, Captain Stan Friese, and Sergeant Clarence Ramseth[2] under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-1--2000e-17 (1976) ("Title VII"); Holiday and Firth did not sue. Generally, the plaintiffs alleged that the defendants denied them equal pay for equal work and that the defendants terminated them, and later refused to rehire them, in retaliation for their demands for equal pay.

The district court segregated the issues of liability and damages. The

liability issue was tried to the court on the basis of depositions, witness summaries, exhibits and testimony. The court entered judgment for the defendants on the merits.

On appeal, the plaintiffs contend (1) they were denied equal pay for work substantially equal to that performed by male guards, and even if the work was not substantially equal, some of the discrepancy in pay can be explained only by sex discrimination; and (2) the defendants retaliated against plaintiffs for asserting equal pay demands by abolishing their jobs, by forcing Vanderzanden to resign, by noting on personnel forms they would not rehire the plaintiffs, and by refusing to rehire Vallance. We affirm in part, reverse in part, and remand for further proceedings.

I

Discriminatory Compensation

Prior to June 1973, the male section of the jail was staffed by male deputy sheriffs. The deputy sheriffs were assigned to jail duties on a temporary basis only, as part of their training, for periods ranging from several days to

one-year. In February 1973, the pay range for a matron was $525-$668; for a deputy sheriff, $736-$940; for a deputy sheriff recruit, $668-812.

Beginning in late June 1973, the deputy sheriffs were replaced by the position of corrections officers. The corrections officers were assigned to the jail on a permanent basis, and the position was open to both males and females. In February 1973, the salary range for a correction officer was $701-896; the range for a correction officer trainee was $668-812.

The district court found that, although the matrons' jobs may have required as much skill as those of the male guards, the matrons' jobs did not require equal effort or responsibility.[3] The court found that the men and women had substantially different workloads. The men and women worked in separate quarters and the male jailers guarded more than ten times as many prisoners as each matron. Unlike the men, the matrons, because they had fewer prisoners to guard, devoted a significant portion of their working time to clerical duties which all parties agreed

was less valuable work. Having determined that the work was not substantially equal, the district court stated "that is the end of the inquiry," and disregarded the plaintiffs' claim that some of the discrepancy in their pay was due to sex discrimination.

The plaintiffs dispute these findings. They contend that they were denied equal pay because the male jailers were paid more even though they and the males both performed substantially equal work. Plaintiffs further contend that, even if the work was not substantially equal, the defendants nevertheless violated Title VII if some of the difference in salary between the plaintiffs and the male guards can be attributed to sex discrimination. In order to evaluate these contentions, we must first consider the interrelationship of Title VII and the Equal Pay Act.[4]

A. The Equal Pay Claim

Under the broad coverage of Title VII of the Civil Rights Act of 1964, it is an unlawful employment practice to discriminate against an individual with respect to compensation on the basis of

the individuals' sex. Section 703(a)(1), codified as 42 U.S.C. §2000e-2(a)(1). The Equal Pay Act, § 206(d) of the Fair Labor Standard Act, 29 U.S.C. § 206(d), while specifically designed to prohibit discrimination based on sex in the area of compensation, is somewhat narrower in language. The Equal Pay Act prohibits an employer from discriminating "between employees on the basis of sex by paying wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill effort and responsibility, and which are performed under similar working conditions . . ."[5] The Act provides four affirmative defenses by which an employer can avoid liability despite proof of unequal pay for equal work.

It is plain that the Equal Pay Act overlaps with the coverage of §703(a)(1) of the Civil Rights Act. See, e.g., Shultz v. First Victorian National Bank, 420 F.2d 648, 659 n.26 (5th Cir. 1969). Both statutes serve the same fundamental purpose of remedying inequality in the

area of compensation, and where an equal pay claim has been raised under either or both statutes, the courts have held that the statutes should be construed harmoniously. Id.; DiSalvo v. Chamber of Commerce, 568 F.2d 593, 596 (8th Cir. 1978). As a result, courts have looked to decisions interpreting the Equal Pay Act for guidance in examining equal pay claims asserted under Title VII. See, e.g. Hays v. Potlatch Forests, Inc., 465 F.2d 1081, 1083 (8th Cir. 1972).

Generally, the Equal Pay Act requires that women receive "equal pay for equal work." See., e.g., Brennan v. Prince William Hospital Corp., 503 F.2d 282 (4th Cir. 1974), cert. denied 420 U.S. 972 (1975). Under the Act, the plaintiffs have the burden of proving that they did not receive equal pay for equal work. E.g., Christopher v. State of Iowa, 559 F.2d 1135, 1138 (8th Cir. 1977). They are not required, however, to show that the jobs performed are identical. Peltier v. City of Fargo, 533 F.2d 374, 377 (8th Cir. 1976); Usery v. Allegheny County Institutions District, 544 F.2d 148, 153 (3rd Cir. 1976). Instead, the plaintiffs may

prove a violation of the Equal Pay Act by showing that the skill, efforts, and responsibility required in the performance of the jobs is "substantially equal." Usery v. Columbia University, 568 F.2d 953, 958 (2d Cir. 1977); Ridgeway v. United Hospitals - Miller Division, 563 F.2d 923, 926 (8th Cir. 1977). To make this showing, actual job performance and content--not job titles, classifications or descriptions--is determinative. See Katz v. School District of Clayton, Missouri, 557 F.2d 153, 156 (8th Cir. 1977); Angelo v. Bacharach Instrument Co., 555 F.2d 1164, 1171 (3d Cir. 1977). It is the overall job, not its individual segements, that must form the basis of comparison, see Usery v. Richman, 558 F.2d 1318, 1320 (8th Cir. 1977), and, because job duties vary so widely, each suit must be determined on a case-by-case basis. Brennan v. Prince William Hospital Corp., 503 F.2d 282 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

We apply the "clearly erroneous" standard of review in determining whether the district court correctly found that the jobs were not substan-

tially equal. Fed. R. Civ. P. 52(a); see DiSalvo v. Chamber of Commerce, 568 F.2d 593, 596-97 (8th Cir. 1978). Our review of the record convinces us that the district court's finding on this issue was not clearly erroneous.

The district court relied heavily on two factors in making its determination: the amount of clerical work performed by the matrons and the prisoner/guard ratio. The record supports the district court's finding that each jailer was responsible for guarding a substantially greater number of prisoners than each matron. Over a six-month period from April to September 1973, the booking records show that the female prisoner population averaged 1.85 inmates per day. The average daily staff of matrons was about 5.5 matrons. Therefore, approximately three matrons were employed for each woman prisoner. In contrast, the average daily staff of 13 male jailers guarded, on the average, between 50 and 60 male inmates per day, or roughly 4 inmates for every guard. In other words, comparing the male and female prisoner/guard ratio, a male guard was typically responsible for 12

times as many prisoners as a matron.[6]

The record likewise supports the district court's conclusion that the matrons did substantially more clerical work than the male guards.[7] Because they had fewer prisoners to guard, the matrons were assigned to do clerical work when they had no other work to perform. As a result, they performed substantial clerical work on every shift, including clerical work relating to the male prisoners. Often this work consumed as much as 50% of their working time. In contrast, the males spent very little time performing clerical work which at most pertained to the booking of male prisoners. The plaintiffs do not seriously dispute that clerical work entails substantially less effort and responsibility than guarding prisoners.

The plaintiffs argue that the amount of clerical work and the prisoner-guard ratios were "insignificant" differences that did not justify the wage differentials. According to the plaintiffs, the clerical work was only incidental to their primary duties; the prisoner/guard ratio exaggerates the amount of the males' responsibilities, because the

presence of a guard is required no matter how many prisoners there are.

The record, however, supports the conclusion that the greater amounts of clerical work and different prisoner/guard ratio makes the position of male guard qualitatively different that the position of matron. The fact the each male guard was required to guard more than ten times as many prisoners as his female counterpart makes a meaningful difference. As the defendants point out, more is required of a prison guard than making sure the cell doors remain locked. Frequent contact between the prisoners and the guard is necessary, and the district court properly concluded that the male guard was forced to exert significantly greater effort and was given signficantly greater responsibility because of the much greater number of prisoners for which he was responsible. For these reasons, the district court was not clearly erroneous by concluding that the work was not substantially equal.

B. Discriminatory Compensation Claims Not Based on a Demand for Equal Pay.

If the plaintiffs' Title VII claim

was simply a claim that they were denied equal pay for equal work, our inquiry would stop here. The plaintiffs argue more than this, however. They contend that even if their jobs were not substantially equal to those of the male jailers, they should be allowed to prove that some of the discrepancy in wages was due to sex discrimination. Implicitly, they argue that Title VII is broader in scope than the Equal Pay Act with respect to discriminatory compensation claims.

Despite the apparent importance of this question, we have found no reported appellate decision that has considered whether Title VII is broader in scope than the Equal Pay Act in this regard. The cases considering the relationship between Title VII and the Equal Pay Act have involved claims that females were being denied equal pay for equal work. See, e.g., Di Salvo, 568 F.2d 593; Orr, 511 F.2d 166. Quite properly, these cases have construed the two statutes harmoniously; any other approach may have produced different results depending on whether a plaintiff labeled his cause of action as being brought under

"Title VII" or under the "Equal Pay Act." These cases did not involve a situation where, as here, the plainiffs claimed they were compensated discriminatorily even if they did not perform equal work. We conclude that Title VII is broader in scope than the Equal Pay Act; however, the resolution of this issue requires a close analysis of the relationship between the two statutes.

The Equal Pay Act, as discussed, applies only to situations where a plaintiff contends there has been a denial of equal pay for equal work. It does not apply, for instance, where the plaintiff is performing comparable (but not substantially equal) work, or where a position held by the plaintiff is unique, see Rinkel v. Associated Pipeline Contractors, 17 FEP Cases 224, 226 (D. Alas. 1978). In contrast, the language of §703(a)(1) is much broader than that contained in the Equal Pay Act. Title VII, however, is not silent on its relationship with the Equal Pay Act. An amendment to § 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), commonly known as the Bennett Amendment, provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of the [the Equal Pay Act].

Two interpretations of the Bennett Amendment are plausible. The Bennett Amendment can be interpreted to incorporate the Equal Pay Act's equal work formula into Title VII. Under this construction, Title VII and the Equal Pay Act would be coextensive in the area of sexually discriminatory compensation and a plaintiff could prove a violation of Title VII only if discriminatory compensation also violated the Equal Pay Act. Alternatively, the Bennett Amendment can be construed as simply incorporating the Equal Pay Act's four affirmative defenses, but not its equal work standard, into Title VII's prohibition. We find the latter interpretation more persuasive.

The relevant legislative history, although sparse, is enlightening. The prohibition against sex discrimination in Title VII was included only shortly

before the passage of the Civil Rights Act. As a result, the legislative history behind the sex discrimination component of Title VII is "notable only for its brevity." General Electric v. Gilbert, 429 U.S. 125, 143 (1976). See Manhart v. Los Angeles Department of Water and Power, 553 F.2d 581, 587 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978). Because sex was included in Title VII at the last minute, Senator Bennett became concerned that it might conflict with the Equal Pay Act. He proposed his amendment from the Senate floor. The complete "legislative history" of the Bennett Amendment is set out in the margin.[8]

Although scant, this dialogue, if anything, supports the interpretation that, Title VII incorporated the Equal Pay Act's four affirmative defenses but not its equal pay formulation. There is no indication that Congress, by the passage of the Bennett Amendment contemplated that the amendment would apply to the kind of situation now before us. Senator Bennett's comment that the purpose of the amendment was

"to provide in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified," 110 Cong. Rec. 13647 (1964), most likely referred to the potential for conflict that would arise if the four affirmative defenses contained in the Equal Pay Act were not included in Title VII. Senator Dirksen's remark that "[a]ll that the pending amendment does is recognize these exceptions, that are carried in the basic act," id., appears to be to the same effect.

Language in Manhart v. City of Los Angeles Department of Power and Water, 553 F.2d 581 ((th Cir. 1977), also supports our conclusion that the Bennett Amendment was designed to incorporate only the Equal Pay Act's four affirmative defenses. In Manhart, the plaintiffs challenged a retirement plan requiring greater contributions from women under §703 of the Civil Rights Act. In noting that such a plan was unaffected by any of the Equal Pay Act's affirmative defenses, we said "all that the Bennett Amendment did was to incorporate the exemptions of the Equal Pay Act into Title VII," Manhart, 553

F.2d at 590. See Laffey v. Northwest Airlines, Inc., 567 F.2d 429, 446 (D.C. Cir. 1976), cert. denied 434 U.S. 1086 (1978) ("a sex-predicated wage differential is immune from attack under Title VII only it if comes within one of the four enumerated exceptions to the equal pay act.")

Moreover, the broad remedial policy behind Title VII persuades us that Title VII's plain language should not be limited further in the absence of a clear Congressional directive. Legislative enactments in the area of job-related discrimination have long evinced a general intent to accord parallel or overlapping remedies. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Accordingly, the rights created under Title VII are independent of the rights created by other statutes. Laffey, 567 F.2d at 445. If we were to limit Title VII's protection against sexually discriminatory compensation practices to those covered by the Equal Pay Act, we would in effect insulate other equally harmful discriminatory practices from review.[9]

There is some district court

authority that is contrary to our interpretations, see IUE v. Westinghouse Electric Corp., 19 FEP Cases 450 (D.N.J. 1979); Wetzel v. Liberty Mutual Insurance Co., 17 FEP cases 232 (W.D. Pa. 1978); Molthan v. Temple University, 412 F. Supp. 448 (E.D. Pa. 1977), but we do not find these decisions persuasive. Of these cases, only IUE gave substantial consideration to the issue before us. In support of its conclusion that Title VII and the Equal Pay Act are coextensive in this area, the court in IUE relied heavily on cases in which equal pay claims were brought under Title VII. See id. at 456. The general rule stated in the cases cited in IUE--that Title VII equal pay claims should be judged under Equal Pay standards--is compatible with the view we have taken. Those cases, however, did not consider the issue whether Title VII prohibits conduct outside the scope of the Equal Pay Act, and we see no reason to extend the rationale of those cases to a significantly different issue which they did not address.

The court in IUE also relied in part on the 1965 guidelines[10] promulgated

by the Equal Employment Opportunity Commission Id. at 455-56. See 30 Fed. Reg. 14927 (1965). To the limited extent that this guideline is authoratative, see General Electric Co. v. Gilbert, 429 U.S. 125, 141 (1976), we do not regard it as contradictory to our holding here. The guidelines acknowledged that §703(h) was designed to avoid conflicting interpretations "with respect to situations to which both statutes are applicable." Consistently, we hold that Equal Pay Act standards apply in Title VII suits when plaintiffs raise a claim of equal pay. When plaintiffs raise a claim under Title VII of discriminatory compensation in the absence of an allegation that they perform substantially equal work, no conflict with the Equal Pay Act arises because the Equal Pay Act is inapplicable.

In summary, we hold that, although decisions interpreting the Equal Pay Act are authoritative where plaintiffs suing under Title VII raise a claim of equal pay, plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices

unless the practices are authorized under one of the four affirmative defenses contained in the Equal Pay Act and incorporated into Title VII by §703(h).

We note that problems of proof may present substantial barriers to establishing this kind of discriminatory compensation claim. Such problems, however, are not sufficent reasons to foreclose the plaintiff from the opportunity to establish a claim of discrimination.

At trial, the plaintiffs offered evidence that a portion of the discrepancy between their salaries and those of the male guards could be ascribed only to sex discrimination.[11] We think that on remand the district court should consider this evidence.

II

The Retaliations Claims

A. Termination.

In December 1973, the County decided to board its prisoners at the Clackamas County Jail and, effective January 15, 1974, to replace the six matrons with two and one-half police stenographers.

The plaintiffs contend that the County abolished their jobs in retaliation for their claim for equal pay.

The district court found that the County's decision was motivated by legitimate, non-disciminatory objectives, because transferring the women prisoners and replacing them with male prisoners would make better use of jail space, and eliminating the matrons' positions would save money.

Under §704(a) of the Civil Rights Act of 1964, 42 U.S.C. §2000e-3, it is an "unlawful employment practice for an employer to discriminate against any of his employees. . . because he has opposed any practice made an unlawful employment practice by this subchapter . . ."

In order to establish a prima facie violation of this section, the plaintiffs must show more than that they protested practices contrary to Title VII and that they were subjected to adverse action by their employer. Miller v. Williams, 590 F.2d 317, 320 (9th Cir. 1979). The plaintiffs must also make a showing that links their conduct with the emmployer's action.

Id. Once the plaintiffs have made this showing, the defendants have the burden of establishing a legitimate, non-discriminatory reason for taking action adverse to the plaintiffs. Id.

The district court made no express finding whether the plaintiffs proved a prima facie violation of §704(a); it found only that the County had a legitimate reason for terminating the plaintiffs. On the record before us, it is questionable whether the plaintiffs showed a sufficent link between their demands for equal pay and the adverse actions taken against them to make a prima facie showing. Assuming arguendo that they have, we find that the district court was not clearly erroneous in determining the County's action was justified by legitimate, non-discriminatory reasons.

Sometime in mid-1973, Sheriff Barnes began receiving complaints from the American Civil Liberties Union (ACLU) about the overcrowded conditions in the men's section of the jail. On November 9, 1973 the ACLU filed a suit against the County seeking to correct these conditions.

The Sheriff's Office began to consider moving the female prisoners to a jail in one of the adjoining counties and eliminating the matron positions. In late November 1973, the undersheriff, Charles Sheratt, prepared a memo in which he determined that the county would save $18,000 a year by acting on the proposed changes. Barnes decided that the county could best alleviate the overcrowded conditions in the men's jail by moving the few female prisoners into a regional facility and moving in the men. There were sixteen cells in the women's prison and there were rarely more than three or four women prisoners in the prison at any given time. The County adopted Barnes' recommendation.

The district court determined that sound economic considerations justified the County's decision. The Court found that between 1971 and 1973, the number of male prisoners processed by the County jumped from 1,884 to 3,270. An increase in "weekend" sentencing, by which low-risk prisoners were allowed to serve time on weekends, aggravated the overcrowding. Conditions became so bad that prisoners were forced to sleep on

the floor.

In light of these conditions, we cannot dispute the district court's finding that the abolition of the plaintiffs' job resulted from the legitimate, non-discriminatory purposes of the defendants. Common sense dictated that they alleviate the overcrowding in the men's facility by eliminating the disproportionately more expensive women's facility.

B. Denial of Vanderzanden's Request for Leave of Absence.

In September 1974, Vanderzanden applied for a leave of absence without pay because she had become physically disabled. Sheriff Barnes denied the request and Vanderzanden resigned. Vanderzanden contends that the defendants denied her leave in retaliation for her demands for equal pay.

The district court found that, even if the County had the burden of proving legitimate reasons for discharging Vanderzanden, it had met its burden by showing that Vanderzanden was encouraged to resign because her superiors justifiably believed that she could no longer do the job. The record supports the

district court's determination.

In 1972 Vanderzanden injured her shoulder in a fall while leaving work. As a result, she was absent from work for four months, two and one-half months of which was unpaid leave.

In August 1973, Vanderzanden, then 56 years old, developed blood clots in her leg, a problem that she had intermittently since 1966. She exhausted all her sick and vacation benefits, and applied for a 90 day unpaid leave of absence. Sergeant Ramseth told Vanderzanden that her leave of absence would not be granted. Ramseth said that her poor health made it impossible for her to perform her job effectively. Vanderzanden tendered her resignation.[12] At the time of her resignation, Vanderzanden's doctor would not permit her to return to work because of her ill health.

Assuming that Vanderzanden has made a prima facie showing of retaliation, we do not find that the district court's determination that the decision to deny Vanderzanden leave was justified by legitimate business reasons is clearly erroneous. Unfortunate as the County's

decision may have been, it was justified by the record. Vanderzanden's prolonged absences from work, her chronic physical ailments, and inability to perform fully her job duties justifies the County's decision.

Vanderzanden presented evidence that Undersheriff Sheratt was granted a leave of absence as a means of showing that sne was unfairly treated. We do not think that this evidence overcomes the showing made by the defendant. Sheratt was automatically entitled to take his paid leave of absence, and returned to work only after obtaining a release from his doctor.

C. Personnel Action Forms.

At the time the plaintiffs were terminated, Sheriff Barnes signed a written "Personnel Action" form for each of them. In answer to the question "would you rehire this employee," the Sheriff checked "no" on each form. He checked "yes" on the forms for the two matrons, Holiday and Firth, who were not plaintiffs to this suit.

The district court made no express finding as to whether the Sheriff's notation constituted a Title VII

violation. It held only that the plaintiffs did not present sufficient evidence to prove that they were harmed by the notation. We find that the plaintiffs did not establish a prima facie violation of §704(a), and do not decide whether the sheriff's action was harmful to the plaintiff.[13]

As we have discussed, to establish a prima facie violation, the plaintiffs must show that there is a link between their assertion of their Title VII rights and the adverse action taken by the defendants. Miller, 590 F.2d at 320. The plaintiffs have failed to demonstrate such a link here. They presented no direct evidence that the sheriff's notations on the personnel action forms were the result of retaliation for the plaintiffs' request for equal pay. Furthermore, the plaintiffs presented no circumstantial evidence that the sheriff acted in response to the plaintiffs' equal pay demands. Moreover, the plaintiffs never confronted the Sheriff with their demands and at best the Sheriff had only a vague awareness that matrons in general were demanding equal pay. After careful

examination of the record, we can find no evidence to infer that the Sheriff knew the plaintiffs, and not Holiday and Firth, were raising equal pay claims. Only if there is evidence that the Sheriff actually knew that the plaintiffs raised such claims, rather than other matrons, can we infer that the Sheriff gave negative recommendations to the plaintiffs and positive recommendations to the other matrons for vindictive reasons. The plaintiffs presented no such evidence. Having not shown that the defendants were aware which matrons were actively supporting the claim for equal pay, the plaintiffs have not proved the necessary link between their demands and the defendants' adverse action that would establish a prima facie violation of §704(a).

D. Refusal to Rehire Vallance.

For a similar reason, we find that the plaintiffs did not establish that the defendants' refusal to rehire Vallance was a prima facie violation of §704(a).

On December 26, 1973, after she had been notified that she would be terminated, Vallance wrote to the Sheriff

requesting a transfer to the newly created position of police stenographer. Vallance indicated that she had passed all the necessary civil service tests for the position. Two days later, the Sheriff wrote to Vallance, denying her request and stating that the positions would be filled by somebody else.

On January 15, 1974, Holiday and Firth made formal written applications for the police stenographer positions; the Sheriff hired both that same day. Because neither had passed the required civil service examination at that time, their appointments were made provisional pending completion of the tests. Firth later failed the examination and was terminated. Vallance contends that the Sheriff's refusal to rehire her was in retaliation for her equal pay demands.

The district court denied Vallance's claim, finding that the Sheriff's appointments of Holiday and Firth were within his discretion under Oregon law. The court noted that Holiday had a good work record and that Firth had a satisfactory one, and that both had more seniority than Vallance.

We need not dwell long on this contention. The plaintiffs presented no direct evidence that the defendant chose Holiday and Firth over Vallance for vindictive reasons. Nor can we infer vindictiveness. There is nothing in the record that shows that defendants were aware that it was Vallance, and not Holiday and Firth, who actively sought higher pay.

Because the plaintiffs have failed to show a prima facie violation of §704(a), we need not decide whether the sheriff's refusal to rehire Vallance was justified by legitimate business reasons.

Affirmed in part, reversed in part, and remanded for further proceedings to afford plaintiffs the opportunity to establish a claim of sexual discrimination apart from an equal pay claim.

FOOTNOTES:

1 The matrons' job titles were periodically readjusted. For the sake of consistency, we use the term "matron" throughout.

2 Sheriff Barnes supervised Captain Friese and Sergeant Ramseth.

Friese supervised the persons working in the corrections division, including the matrons and Ramseth. Ramseth's duties related primarily to the handling of prisoners and he apparently had limited authority over the matrons.

3 In its analysis, the district court did not distinguish between the deputy sheriffs who worked in the jail, and their replacements, the corrections officers. The record shows that the in-jail duties of the deputy sheriffs and the corrections officers were the same and thus, we likewise find it unnecessary to draw a distinction in comparing their duties to those of the matrons. We do note because the deputy sheriffs must be certified as police officers by the State of Oregon they possess skill and training that the matrons do not have.

4 The plaintiffs did not sue under the Equal Pay Act. The Equal Pay Act did not apply to the government employees until May 1, 1974. The Fair Labor Standards Amendments of 1974, Pub. L. 93-259, §1(a), Apr. 8, 1974, 88 Stat. 55. The plaintiffs' jobs were terminated on January 15, 1974, and thus their claims are cognizable only under Title VII.

5 In full, 29 U.S.C. §206(d)(1) (1970) provides:

> No employer having employees subject to any provisions of this section shall discriminate within any establishment in which such employees are employed, between employees on

> the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

6 The parties are not in complete agreement as to importance that should be assigned to the various statistical evidence introduced at trial. We agree with the district court that the average daily census more accurately reflects the prison's population. The prison's yearly census is not nearly as accurate, because it does not account for the widely-varying lengths of incarceration amoung the prisoners.

The Plaintiff also claims that the average daily population in the women's jail was 3.9 inmates per day, rather than the 1.8 figure provided by the defendants and used by the district

court. We have examined both computations and find that the district court's choice of figures was not erroneous.

7 This district court found that the clerical duties performed by the matrons included processing fingerprint cards and mug shots; filing reports and mug shots; filling out F.B.I. reports; keeping mail and medical records; recording deputy sheriff's activities; and censoring mail.

8 Mr. BENNETT. Mr. President, I yield myself 2 minutes.

The PRESIDING OFFICER. The amendment will be stated.

The legislative clerk read as follows: On page 44, line 15, immediately after the period, it is proposed to insert the following new sentence: It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

Mr. BENNETT. Mr. President, after many years of raving by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which

became effective only yesterday. By this time, programs have been established for the effective adminstration of this act. Now, when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act. The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.

I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill.

If they will confirm that understanding, I shall ask that the amendment be voted on without asking for the yeas and nays.

Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.

Mr. DIRKSEN. Mr. President, I yield myself 1 minute.

We were aware of the conflict that might develop because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain

exceptions.
All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
Therefore, this amendment is necessary, in the interest of clarification.
The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah.
(Putting the question.)
110 Cong. Rec. 13647 (1964).

9 Assume for example, that an employer tells a female worker, not employed at a position that is substantially equal to that performed by a male, that he would pay her $30 a week more if she was male. For want of a male counterpart performing equal work, such blatant discrimination would not be prohibited by the Equal Pay Act. Rinkel, 17 FEP Cases at 226. We find no indication, however, that the Bennett Amendment was intended to legalize such practices under Title VII. Likewise, in a situation where primarily women are employed in a type of job that is comparable but not substantially equal to that performed by men, an employer is free under the Equal Pay Act to decrease the wages of the women solely bacause of their sex. Such a practice is prohibited by the plain language of §703 and will continue to be under our interpretation of the Bennett Amendment.

10 This guideline, formerly codified at 29 U.S.C. §1604 7(1) stated that:

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 205(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of equal pay for equal work set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of tne prohibition against discrimination in compensation because of sex is coextensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

11 For instance, Sheriff Barnes testified that he thought the disparity betweeen the salaries of the matrons and the deputies should have been less. In fact, the sheriff had previously attempted to upgrade the salary of the matrons.

12 The parties dispute whether Vanderzanden was "terminated" or "forced to resign". We find that the characterization is immaterial and assume that Vanderzanden was terminated.

13 The fact that the district court failed to make an explicit finding of fact on the existence of a prima

facie violation does not preclude us from deciding this issue, especially where the record consists primarily of documentary evidence. See Magna Weld Sales Co. v. Magna Alloys & Research Pty., 545 F.2d 668, 671 (9th Cir. 1976); Armstrong v. Collier, 536 F.2d 72, 77 (5th Cir. 1976).

Opinion of the District Court
(Decided September 3, 1976)

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs, | ) | Civil No. 74-581 |
| vs. | ) | OPINION |
| THE COUNTY OF WASHINGTON; SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants. | ) | |

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SOLOMON, Judge:

The plaintiffs, Alberta Gunther, Velene M. Vallance, Marion E. Vander Zanden, and Yvonne M. Hatton, are four women who worked as matrons at the Washington County jail. They charged the County and Sheriff Warren Barnes with sex discrimination and assert that the County paid them less than men jailers for similar work, later fired them, and refused to rehire them, because they sought equal pay.

Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e et seq., was amended, effective March 24, 1972, to include states and local governments as employers prohibited from discrimination. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, §2(1), 86 Stat. 103, amending 42 U.S.C. §2000 (1964) [codified at 42 U.S.C. §2000e(a)].[1] By March 1972, the plaintiffs had worked as matrons[2] at

the jail for periods varying from six months to four and a half years.

The Washington County jail lodged its men prisoners on the second floor and its women prisoners in 16 or 18 cells on the third floor. The County employed six full-time matrons: the plaintiffs here, and Dorothy Holliday and Donna Firth, who are not plaintiffs. Generally, two matrons worked on each eight-hour shift; and, on an average day, there were two women prisoners in the jail.

The matrons' principal duties were to process and guard women prisoners and to transport them to and from court.[3] Because there were so few women prisoners, the matrons spent much of their time on clerical work. The amount varied among the matrons from about ten to seventy-five per cent.[4]

In 1972, men prisoners were guarded by a staff of 13 deputy sheriffs, who were temporarily assigned, as part of their training, to jail duty for periods of a few days to a year. The deputies' responsibilities and activities were similar to the matrons', except that the deputies spent more time with the

prisoners and less time on clerical work. On an average day, there were between 50 and 60 men prisoners in the jail. Therefore, on the average, there was one guard for every four men prisoners, as contrasted with three matrons for every one woman prisoner.

In March 1972, the Washington County Police Officers' Association (the union) was formed, and the deputy sheriffs, the matrons, and other jail employees became members, the union negotiated its first contract with the County effective June 1, 1972.

In December 1972, the Washington County Commissioners, on the recommendation of Sheriff Barnes, created the positions of corrections officer and corrections officer trainee. The Commissioners' purpose was to free the time of the deputy sheriffs for patrol or "road work" outside the jail and also to professionalize the job of jail guard. The County asserts that the new positions were open to women as well as men, and the matrons do not dispute that assertion.

About the same time, the Commissioners approved increases of about ten

per cent in the salary ranges of matrons, recruits, and deputy sheriffs, among others, to coordinate their pay with that of the corrections officers and trainees. The range increases were effective February 1, 1973. The old and new monthly ranges were as follows:

| | Old | New |
|---|---|---|
| Deputy Sheriffs | $668-853 | $736-940 |
| Deputy Sheriff Recruits | 636-736 | 701-812 |
| Corrections Officers | --- | 701-896 |
| Corrections Officer Trainees | --- | 668-812 |
| Matrons | 476-606 | 525-668 |

The Commissioners rejected a proposal by the Sheriff to increase the matrons' ranges by about 30 per cent over their old salaries and about 20 per cent over their new salaries, on the grounds that it might be an unfair labor practice for the County to offer selective increases to one group of its union employees outside the collective bargaining process.

Correction officers, in June 1973, began to replace deputy sheriffs in the men's section of the jail. Shortly

thereafter, at a union meeting, plaintiff Alberta Gunther asked union officials to demand the same pay for the matrons as the new corrections officers. She was told to research the matter further.

A day or two later, Stanley Friese, captain of the jail division, spoke with Holliday, the most senior matron. Friese said that, because of the overcrowding in the men's section, the Sheriff was considering whether to board the women prisoners with another county. Holliday, with Friese's permission, reported this information to the other matrons. They testified that they interpreted Friese's remarks as a warning: if they pressed their demands for equal pay, they might lose their jobs.

Overcrowding in the men's jail was a serious problem. Between 1971 and 1973, the number of men prisoners processed by the County jumped from 1,884 to 3,280. Although the number of women prisoners also increased, there were seldom more than six women on any one day, and on some days there were no women prisoners. An increase in "weekend" sentencing, by which low-risk prisoners were

permitted to serve their time on weekends aggravated the overcrowding. The jail received unfavorable publicity after it required some prisoners to sleep on the floor. The American Civil Liberties Union investigated complaints of overcrowding and later filed an action on behalf of several prisoners.

On November 19, 1973, officials of the union and the County reviewed the matrons' demands. Shortly thereafter, Undersheriff Charles Sherratt prepared a study which he said showed that the County could save about $18,000 per year if it boarded its women prisoners at the Clackamas County jail and replaced the six matrons with two and a half police stenographers. The County Commissioners on December 18, 1973, adopted the recommendations and terminated the matrons as of January 15, 1974.

On December 26, 1973, Vallance applied for a voluntary demotion to police stenographer. The Sheriff told her that the positions were filled. On January 15, 1974, he provisionally appointed Holliday and Firth as stenographers, but there was no evidence on when he had offered them the positions.

Neither had passed the typing test, as Vallance had. Holliday later passed the typing test, and Firth was terminated when she failed to pass it. Unlike the four plaintiffs, Holliday and Firth had kept silent on the equal pay issue.

When the matrons were terminated, Sheriff Barnes filled out a "Personnel Action" form for each of them. The form asked, "Would you be willing to reemploy [this person] in the future?" On the forms for Gunther, Hatton, and Vallance, Sheriff Barnes wrote, "No". For Holliday and Firth he wrote, "Yes."

In June 1972, Matron Vander Zanden, then 55, tripped over a sidewalk on her way home from the jail and seriously injured her right arm and knee. She missed four months of work and used all her accumulated sick leave. She asked for, and received, a six-week leave of absence without pay.

In July 1973, she developed a blood clot in her leg and missed work beginning August 9. In September, she again applied for unpaid leave. Captain Friese denied the request. She asked whether the denial meant that she was being terminated, and Sergeant Clarence

Ramseth told her that he guessed that it did. Shortly thereafter, she was allowed to resign for health reasons.

Title VII of the Civil Rights Act of 1964 provides in part:

> It shall be an unlawful employment practice for an employer --
>
> . . . to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation . . . because of . . . sex . . .; or
>
> . . . to limit, segregate, or classify his employees . . . in any way which would deprive . . . any individual of employment opportunities or otherwise adversely affect his status as an employee, because of . . . sex . . . .
>
> 42 U.S.C. §2000e-2(a) (1964)

Congress added "governments, governmental agencies, [and] political subdivisions" to those employers subject to Title VII, effective March 24, 1972. Section 2(1) of the Equal Employment Opportunity Act of 1972, 86 Stat. 103, 42 U.S.C. §2000e(a) (1970 ed., Supp. IV).

The County asserts that Congress exceeded its powers under the Commerce

Clause when it extended Title VII to include states and local governments. In Fitzpatrick v. Bitzer, 44 U.S.L.W. 5120 (U.S. June 28, 1976), the Supreme Court pointed out that Congress derived its authority to pass the 1972 Amendments to Title VII from Section 5 of the Fourteenth Amendment and not the Commerce Clause. The Court held that, when the States ratified the Fourteenth Amendment, they yielded some of their rights to control their own affairs to the federal government. One such right, in those areas where Congress was authorized to act under Section 5 of the Fourteenth Amendment, was the right of a State, under the Eleventh Amendment, not to be sued without its consent by its own citizens. 44 U.S.L.W. at 5123.

The County also contends that the 1972 Amendments to Title VII unconstitutionally invade rights reserved to the States by the Tenth Amendment. There is no merit in this contention. I hold that Title VII is constitutional as applied to Washington County.

A ruling on Sheriff Barnes' motion to dismiss was postponed until the trial.[5] I deny the motion to dis-

miss. The Sheriff exerted sufficient control over the salaries and the subsequent dismissals of the matrons to be considered an employer under Title VII. Nevertheless, I find that the Sheriff is entitled to qualified immunity because he acted in good faith and within his official capacity. Hutchison v. Lake Oswego School District No. 7, 519 F.2d 961, 968 (9th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3285 (U.S. Oct. 10, 1975) (No. 75-568), cross-petition for cert. filed, 44 U.S.L.W. 3446 (U.S. Jan. 10, 1976) (No. 1049).

The matrons contend that their jobs were substantially equal to those of the deputy sheriffs and the corrections officers.[6] The County contends that there were significant differences between the men's and women's jobs and that those differences accounted for the salary differentials.

The matrons and the County assumed that men and women prisoners should be housed separately and that, generally, men should guard men and women should guard women. As a result, the matrons and the men guards worked in separate

quarters and had different workloads. The men supervised more than ten times as many prisoners for each guard as the matrons did. The matrons therefore devoted much of their time to clerical chores. The matrons do not dispute that clerical work is less valuable than guard work and entitles one to less pay than guard work.

In the summer and fall of 1973, the matrons asked for equal pay with the corrections officers. But they did not apply to become corrections officers, even though the jobs were open to them.

The plaintiffs concede that they have the burden of proving that their jobs were substantially equal to those of the men guards. Under the Equal Pay Act of 1963,[7] the plaintiffs must prove unequal pay for ". . . equal work on jobs . . . [requiring] . . . equal skill, effort, and responsibility . . . performed under similar working conditions . . ." 29 U.S.C. § 206(d)(1).

Plaintiffs have not met their burden of proving that the men's and women's jobs were substantially equal. Even though the matrons' jobs may have required as much skill as those of the

men guards, the matrons' jobs did not require equal effort or equal responsibility.

The matrons contend, however, that even if the men's jobs were more difficult, the differences in pay were much greater than the differences in difficulty of the work. The matrons contend that some of the differences in pay can be explained only by the existence of sex discrimination.

The case of Albermarle Paper Co. v. Moody, 422 U.S. 405 (1975), on which the matrons rely, is not in point. There the Supreme Court noted that the District Court had held that the employer ". . . had 'strictly segregated' the plant's departmental 'lines of progression' . . . reserving the higher paying and more skilled lines for whites . . ." 422 U.S. at 409. Nevertheless, the District Court refused to award back pay. The Supreme Court held that, given a finding of unlawful discrimination, back pay ". . . should be denied only for reasons which, if applied generally, would not frustrate the central statutory purposes of eradicating discrimination throughout

the economy and making persons whole for injuries suffered through past discrimination." 442 U.S. at 421 (footnote omitted).

Here the basis for an award of back pay--finding of unlawful discrimination--is lacking.

If the jobs are substantially dissimilar, that is the end of the inquiry. See 29 C.F.R. §800.120 (1965). Under these circumstances, the overpayment of corrections officers or the underpayment of matrons are not matters which I can either explore or correct. The union may not have been as aggressive as it should have been in supporting the matrons' demands for equal pay, but that dereliction, if it was one, cannot be charged to the County. There was no allegation here of a conspiracy between the union and the County.

The plaintiffs also contend that the County dismissed them, and refused to rehire them, because they demanded equal pay.

No employer, private or governmental, should be prevented from eliminating an unnecessary position

merely because all the holders of that position are women--provided there are good, nondiscriminatory reasons why they are all women and why the position should be eliminated.

The County, its jail officers, and its women prisoners shared a legitimate concern that at least some of those who guarded the women prisoners be women.[9] Because the staff was so small, it was probable that all or almost all those who guarded women would be women.

The County's objectives in eliminating the matrons' positions were to save money and make better use of the jail space. The existing arrangement made no sense. Each man guarded about four prisoners; each matron guarded about one-third of a prisoner. The men's section often overflowed, while the women's section averaged ten or more empty cells. The County's objectives were both reasonable and commendable.

The Sheriff's appointments of Holliday and Firth, rather than Vallance, as police stenographers were within his discretion. See ORS §§ 204.601(2) (1953) and 204.635(2)

(1963). Holliday had a good work record and Firth a satisfactory one. Both had more seniority than Vallance.

The plaintiffs also assert that they were prejudiced in their attempts to regain employment with the County because of the Sheriff's notation in the termination order against rehiring them. The matrons did not present sufficient evidence to prove that they were harmed by that notation.

Mrs. Vander Zanden contends that she was coerced into resigning after the County denied her request for an unpaid medical leave. The evidence is undisputed that Vander Zanden was a good worker when she was healthy;[10] but, as she noted on her application for employment as a matron, she had experienced medical problems with her legs since at least 1966.

In September 1973, when she asked for a leave of absence, she had already missed several weeks' work because of a blood clot in her leg. She was then 56, and had spoken of retirement. According to the official job description, the work of a matron required ". . . good physical condition and physical strength

to handle unruly inmates."

Even if the County had the burden of proving legitimate, nondiscriminatory reasons for discharging Mrs. Vander Zanden, cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 et seq. (1973), in my view the County met its burden. Mrs. Vander Zanden was encouraged to resign not because she asked for equal pay, but because her superiors justifiably believed that she could no longer do the job.

Plaintiffs' action should be dismissed. No costs or attorneys' fees.

This opinion shall constitute findings of fact and conclusions of law pursuant to Fed R. Civ. P. 52(a).

FOOTNOTES

1 The legislative history is discussed in Fitzpatrick v. Bitzer, 44 U.S.L.W. 5120, 5121 n.2 (U.S. June 28, 1976).

2 Although the matrons' job titles and duties were periodically adjusted, the term "matron" is here used for the sake of consistency.

3 An official job description gave these examples, among others, of

the matrons' duties: register, assign, examine, and instruct new prisoners; dispense minor medication; supervise visitors; censor mail; inspect living quarters and supervise light housekeeping; transport prisoners to and from court or for medical treatment; attend mental patients at hearings; and test sobriety with a breathalyzer. The matrons were also required to sit in on interviews and to maintain ". . . a constant security watch . . . ."

4 These clerical activities included: processing fingerprint cards and mug shots; filing reports and mug shots; filling out F.B.I. reports; keeping mail and medical records; recording deputy sheriffs' activities; and censoring mail.

5 Captain Friese and Sergeant Ramseth were dismissed as defendants by stipulation.

6 The matrons filed this action under the Equal Pay Act of 1963, 29 U.S.C. §206(d), as well as Title VII. Although the constitutionality of the Equal Pay Act, as applied to States and local governments, is now in doubt, see National League of Cities v. Usery, 44 U.S.L.W. 4974 (U.S. June 24, 1976), I need not reach that issue because the Equal Pay Act did not apply to governmental employers until May 1, 1974. The matrons were terminated January 15, 1974.

7 The Equal Pay Act of 1963, 29 U.S.C. §206(d), and Title VII are interlocked, see 42 U.S.C. § 200e-2(h), and the sex discrimination prohibitions of Title VII must be construed in the

same manner as the Equal Pay Act. Schultz v. Wheaton Glass Co., 421 F.2d 259, 266 (3d Cir.), cert. denied, 398 U.S. 905 (1970). Even if the Equal Pay Act is unconstitutional as applied to States and local governments, the precedents under it are useful for Title VII purposes.

8 Section 2000e-2(e)(1) of Title 42, U.S.C., permits an employer to hire on the basis of sex where sex is ". . . a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise . . ."

The County contended that sex was a bona fide occupational qualification for at least some of the matrons' jobs, and the matrons did not dispute this contention.

9 Under Oregon law, a woman must be present "when a female prisoner requires a search or at any time during confinement that a female prisoner's cell needs to be entered", ORS § 169.075(3) (1973), or "[w]henever any woman or girl is interrogated with reference to the commission of any sexual crime . . . whether . . . committed by her or by some other person", ORS § 136.345. And: "Whenever . . . the sheriff of any county . . . convey[s] any female to any of the penal, reformatory or eleemosynary institutions of this state, the sheriff shall cause such person to be accompanied by a female attendant to the place of confinement." ORS § 137.360(2).

10 For example, Captain Friese

wrote on a 1972 merit rating: "Has not been in the best of health & is not a fast worker. However she works hard & is a dependable employee. Does her best at whatever she does & does not complain."

Order of the Court of Appeals
Denying Petition for Rehearing
(Filed May 1, 1980)

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

| | | |
|---|---|---|
| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs-Appellants, | ) | No. 76-3448 |
| vs. | ) | ORDER |
| THE COUNTY OF WASHINGTON: SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants-Appellants. | ) | |

Appeal from the
United States District Court
for the District of Oregon

Before: MERRILL and TANG, Circuit Judges and TAYLOR,* District Judge.

*Honorable Fred M. Taylor, Senior United States District Judge for the District of Idaho, sitting by designation.

TANG, Circuit Judge:

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The Supplemental Opinion on Denial of Rehearing is ordered filed and the petition for rehearing is hereby denied and the suggestion for rehearing en banc is rejected.

Equal Pay Act
29 U.S.C. § 206(d)(1)

(d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantify or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

Title VII of the
Civil Rights Act of 1964
42 U.S.C. §2000e-2(a),(h)

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin; or

. . .

(h) Notwithstanding any other provision of this title, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin, nor shall it be an unlawful

employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its adminstration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)).

No. 80-429

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

PETITIONERS,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

RESPONDENTS.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

# JOINT APPENDIX


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PETITION FOR CERTIORARI FILED
SEPTEMBER 2, 1980
CERTIORARI GRANTED NOVEMBER 3, 1980

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# COMPLAINT

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF OREGON

| | | |
|---|---|---|
| ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, YVONNE M. HATTON, Plaintiffs, vs. THE COUNTY OF WASHINGTON; SHERIFF WARREN BARNES, in his capacity as Sheriff of Washington County; CAPTAIN STAN FRIESE and SERGEANT CLARENCE RAMSETH, in their capacities as Washington County Police Officers, Defendants. | ) | Civil No. 74-581 COMPLAINT |

## NATURE OF ACTION

This is an action for declaratory judgment and damages under Title VII of the Civil Rights Act of 1964, as amended, 42 USC § 2000e, et seq.

## JURISDICTION

The Court has jurisdiction of this proceeding under 28 USC § 1343 and 42 USC § 2000e et seq.

## PLAINTIFFS

Plaintiffs are female citizens of the United States, residents of the State of Oregon and over the age of 21 years.

Prior to January 15, 1973, plaintiffs were employed by defendants as jail matrons at the Washington County jail.

## DEFENDANTS

Washington County is a political subdivision of the State of Oregon and is an employer within the meaning of 42 USC § 2000e.

Defendant Warren Barnes is the Sheriff of Washington County, and Captain Stan Friese and Sergeant Clarence Ramseth are Washington County police officers. Defendants Barnes, Friese and Ramseth are each agents of Washington County, within the meaning of 42 USC § 2000e.

VIOLATION OF TITLE VII

In their employment by defendants as jail matrons, plaintiffs received lower compensation than male employees performing substantially the same services. When plaintiffs requested defendants to provide plaintiffs with compensation equal to that paid to plaintiffs' male counterparts, defendants refused. As a consequence of plaintiffs' demands to receive equal pay, defendants terminated plaintiffs' employment.

Defendants' refusal to provide plaintiffs with compensation equal to that paid to their male counterparts and defendants' termination of plaintiffs employment for the reason that plaintiffs demanded equal pay constitutes unlawful employment practices within the meaning of 42 USC § 2000e-2.

DAMAGES

As a consequence of defendants' unlawful employment practices, plaintiffs have been damaged to the extent of $8,000 each for lost wages.

Defendants' violations of Title VII were willful and plaintiffs are entitled to punitive damages in the amount of $5,000 each.

EXHAUSTION OF REMEDIES

On February 8, 1974, each of the

plaintiffs filed with the Equal Employment Opportunity Commission (EEOC) and the Civil Rights Division of the Bureau of Labor of the State of Oregon a charge that defendants discriminated against them in violation of Title VII of the Civil Rights Act of 1964, as amended.

On February 15, 1974, the Civil Rights Division of the Bureau of Labor of the State of Oregon terminated its jurisdiction of plaintiffs' complaint.

On April 24, 1974, plaintiffs received written notice from the United States Department of Justice that the EEOC would not be able to investigate and conciliate plaintiffs' charges within 180 days of the date the EEOC assumed jurisdiction, and that plaintiffs therefore had the right to institute a civil action against defendants under Title VII of the Civil Rights Act of 1964.

COSTS AND ATTORNEYS FEES

Plaintiffs are entitled by law to their costs and reasonable attorneys fees.

WHEREFORE, plaintiffs pray for relief as follows:

1. For a judgment declaring that defendants' refusal to pay plaintiffs compensation equal to that paid to plaintiffs male counterparts was an unlawful employment practice under Title VII of the Civil Rights Act of 1964, as amended;

2. For judgment declaring that defendants' termination of plaintiffs' employment for the reason that plaintiffs demanded equal pay was an unlawful employment practice under Title VII of the Civil Rights Act of 1964, as amended;

3. For compensatory damages in the

amount of $8,000 for each plaintiff;

4. For punitive damages in the amount of $5,000 for each plaintiff;

5. For costs and attorneys fees;

6. For such other relief as the Court deems proper.

DATED this 17th day of July, 1974.

LINDSAY, NAHSTOLL, HART,
DUNCAN, DAFOE & KRAUSE

By /s/ Carol A. Hewitt
Of Attorneys for Plaintiffs

(Jurats, exhibits and affidavits of service omitted.)

ANSWER

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON

| | | |
|---|---|---|
| ALBERTA GUNTHER, et al, | ) | |
| | ) | |
| Plaintiffs, | ) | |
| vs. | ) | |
| | ) | Civil No. |
| THE COUNTY OF WASHINGTON, et al, | ) | 74-581 |
| | ) | |
| | ) | ANSWER |
| Defendants. | ) | |

FIRST DEFENSE

1. Defendants admit the allegations contained in the paragraph of the complaint entitled Nature of Action; admit the first sentence in the paragraph entitled Plaintiffs; admit that prior to January 15, 1973, plaintiffs were employed by defendant Washington County as jail matrons at the Washington County jail; and admit the first two sentences in the paragraph entitled Defendants.

2. Defendants allege that they are without information or knowledge sufficient to form a belief as to the truth of the allegations contained in the paragraph entitled Exhaustion of Remedies.

3. Defendants deny each and every other allegation contained in the complaint.

SECOND DEFENSE

Jurisdiction is predicated upon 42 USC 2000e et seq. which statutes, when applied to local government and local government employees performing governmental functions, are unconstitutional because of an attempted exercise of congressional power beyond the limits of the Federal Commerce Power.

THIRD DEFENSE

The complaint fails to state a claim upon which relief can be granted because defendants are protected by sovereign and official immunity.

WHEREFORE, the defendants, and each of them demand judgment dismissing the complaint, with costs and reasonable attorney fees.

Office of Washington
County Counsel

By /s/ Lawrence R. Derr
Of Attorneys for Defendants

(Jurat and affidavit of service omitted.)

PRETRIAL ORDER

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF OREGON

(Title omitted in printing)

As a result of pretrial conferences heretofore held, at which Plaintiffs were represented by Carol A. Hewitt, of Lindsay, Nahstoll, Hart, Dafoe & Krause, and Defendants were represented by Lawrence R. Derr, Washington County Counsel's Office, their respective counsel, the following issues of fact and law were framed and exhibits identified.

I

STATE OF JURISDICTION

1. Nature of Proceedings

Plaintiffs seek a declaratory judgment that the defendants discriminated against Plaintiffs on the basis of sex

in violation of Title VII of the Civil Rights Act of 1964, as amended. Plaintiffs also seek damages and attorneys' fees under the Act. Plaintiffs contend that the Court has jurisdiction under 28 USC §1343 and 42 USC §2000e et seq (Title VII).

## II

## AGREED FACTS

The following facts have been agreed upon by the parties and require no proof:

1. Each of the plaintiffs is a citizen of the United States, a resident of the State of Oregon and of the female sex.

2. Prior to January 15, 1973, plaintiffs were employed by defendants as jail matrons at the Washington County jail.

3. Defendant Washington County is

a political subdivision of the State of Oregon and is an employer within the meaning of Title VII.

4. Defendant Warren Barnes is the Sheriff of Washington County.

5. In their employment by defendants as jail matrons, plaintiffs received lower compensation than male employees of defendants who were classified as deputy sheriffs and later, corrections officers.

6. During 1973, plaintiffs' employment with the defendants was covered by a collective bargaining agreement between the County and the Washington County Police Officer's Association (The "Association"), of which the plaintiffs were members.

7. Article IV of the collective bargaining agreement between The Association and the County prohibited dis-

crimination in its application on the basis of age, marital status, race, color, creed, religion, national origin, union affiliation or political affiliation. The agreement does not list sex as a prohibited basis for discrimination.

8. On three occasions during the last two weeks of October 1973, the Plaintiffs discussed with the Washington County personnel officer, Ryan Brown, Plaintiffs' concern about the fact that Plaintiffs received a lower rate of pay than the male employees who worked in the men's section of the jail.

9. In September 1973, Plaintiff Marion Vanderzanden applied for a leave of absence from her employment with the County due to the fact that she had been physically ill and had been unable to work since August 9, 1973.

10. On September 30, 1973, Plain-

tiff Marion Vanderzanden's superior, Sergeant Ramseth, wrote a memorandum to Under-Sheriff Charles Sherratt, recommending that no leave of absence be granted to Plaintiff Vanderzanden and that "after 52 days absence that action should be taken to terminate this employee." In accordance with this recommendation, Plaintiff Marion Vanderzanden resigned her employment with Defendants.

11. In December 1973, Washington County terminated the position of jail matron and in January 1974, terminated the employment of the remaining Plaintiffs.

12. At the time Plaintiffs Vallance, Gunther and Hatton were terminated, a form entitled "Personnel Action" was filled out by Sheriff Barnes on each of the above-named Plaintiffs stating that these three Plaintiffs

would not be rehired by the Sheriff.

13. The Civil Service Examination used by Defendant Washington County for the position of jail matron was the same examination used for corrections officer and was entitled "County Civil Service Examination for Matron-Jailer."

14. Plaintiffs have exhausted their administrative remedies.

## III

## PLAINTIFFS' CONTENTIONS

Plaintiffs make the following contentions:

1. The Court has jurisdiction of this proceeding under 28 USC §1343 and 42 USC §2000e et seq. (referred to herein as Title VII).

2. At all times material, Plaintiffs were employees of Defendants within the meaning of Title VII, and Defen-

dants were employers of Plaintiffs.

3. As jail matrons, Plaintiffs performed substantially the same work as Plaintiffs' male counterparts in the male section of the Washington County jail, who were classified as deputy sheriffs and later as corrections officers.

4. Defendants refused Plaintiffs the same fringe benefits and educational opportunities that Defendants afforded to corrections officers solely on the basis of Plaintiffs' sex. Defendants' refusal and failure to pay Plaintiffs the same pay as it paid Plaintiffs' male counterparts who performed substantially the same work, constitutes a violation of Title VII and the Equal Pay Act.

5. On numerous occasions, Plaintiffs informed Defendants and their agents that Plaintiffs believed they

were entitled to pay equal to that paid their male counterparts.

6. Defendants terminated Plaintiffs' employment because Plaintiffs attempted to assert their rights to equal pay, and such termination was in retribution for Plaintiffs making such claim.

7. On at least one occasion, Defendants' agent informed Plaintiffs that if they continued to demand equal pay they would lose their jobs.

8. At the time Defendants terminated Plaintiffs' employment, each of the Plaintiffs except Marion Vanderzanden was ready, willing and able to perform services for Defendants as required by Plaintiffs' employment.

9. Defendants refused to grant Plaintiff Marion Vanderzanden a leave of absence because she had requested equal

pay to that paid to her male counterpart.

10. Defendant Warren Barnes is an employer within the meaning of Title VII.

11. Plaintiff Marion Vanderzanden was forced by Defendants to resign her employment with Defendants.

12. Under-Sheriff Charles Sherratt was granted a leave of absence in March 1973 due to the fact that he suffered a heart attack and returned to work in July of 1973. He was again granted a leave of absence in March of 1975 and as of July 10, 1975 had not yet returned to work.

13. Plaintiffs are entitled to damages, costs and reasonable attorneys' fees and punitive damages.

## IV

## DEFENDANTS' CONTENTIONS

1. The Court does not have juris-

diction of this proceeding because Title VII, when applied to local government and local government employees performing governmental functions, is unconstitutional as an attempted exercise of congressional power beyond the limits of the Federal Commerce Power.

2. The wages and fringe benefits paid to Plaintiffs in 1972 and 1973 were negotiated with the Washington County Police Officers Association, Plaintiffs' representative, through collective bargaining and were not determined based on Plaintiffs' sex.

3. Plaintiff Marion Vanderzanden resigned voluntarily for health reasons when she was unable to perform her job and had used all of her accrued sick leave.

4. The jail matrons positions were abolished because female prisoners were

no longer lodged in the Washington County jail. The decision to board female prisoners was based primarily on the need for additional room for male prisoners and incidentally on cost economy. The remaining Plaintiffs were laid off because they did not qualify or apply for other County positions.

5. Other jail matrons, not Plaintiffs in this suit, did qualify and apply for other County positions and are presently employed by the County.

6. Defendants are entitled to their costs and reasonable attorneys' fees.

## V

## ISSUES OF FACT

The parties believe that the issues of fact are adequately framed by this Pretrial Order and the record in this case.

VI

ISSUES OF LAW

The parties believe that the issues of law are adequately framed by this Pretrial Order and the record in this case.

VII

EXHIBITS

DATED this 20th day of July, 1975.

/s/ Gus J. Solomon
District Judge

The foregoing Pretrial Order is approved:

/s/ Carol A. Hewitt — 10/20/75
Attorney for Plaintiff — Date

/s/ Lawrence R. Derr — 10/20/75
Attorney for Defendant — Date

## OPINION

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF OREGON

(Reproduced in the Petition for

Writ of Certiorari, page 57a)

## NOTICE OF APPEAL

IN THE UNITED STATES DISTRICT
COURT FOR THE DISTRICT
OF OREGON

(Title omitted in printing)

Notice is hereby given that Alberta Gunther, Velene M. Vallance, Marion E. Vander Zanden and Yvonne M. Hatton, plaintiffs above-named, hereby appeal to the United States Court of Appeals for the Ninth Circuit from the final judgment entered in this action on the 3rd

day of September, 1976.

Dated this 28th day of September, 1976.

LINDSAY, NAHSTOLL, HART
& KRAUSE

By /s/ Carol A. Hewitt
Of Attorneys for Plaintiffs

(Jurat and affidavit of service omitted.)

## OPINION

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Reproduced in the Petition for Writ of Certiorari, page 20a)

SUPPLEMENTAL OPINION
ON DENIAL OF REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Reproduced in the Petition for

Writ of Certiorari, page 1a)

ORDER DENYING
PETITION FOR REHEARING

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

(Reproduced in the Petition for

Writ of Certiorari, page 77a)

CHRONOLOGICAL LIST

| | |
|---|---|
| Complaint filed | July 19, 1974 |
| Defendants' Answers to Plaintiff's interrogatories filed | February 1, 1975 |
| Answer filed | February 18, 1975 |
| Defendants' Supplemental Answers to Plaintiff's Interrogatories filed | February 28, 1975 |
| Defendants' Third-Party Complaint Against the Washington County Police Officers' Association filed | February 28, 1975 |

| | |
|---|---|
| Washington County Police Officers' Association Motion to Dismiss Third-Party Complaint filed | March 27, 1975 |
| Recommendation and Order Dismissing Third-Party Complaint filed | April 22, 1975 |
| Pretrial Order filed | March 19, 1976 |
| Trial commenced | March 19, 1976 |
| Opinion and Judgment of the District Court filed | September 3, 1976 |
| Notice of Appeal filed | September 29, 1976 |

# 80-429

Supreme Court, U.S.
FILED
OCT 7 1
MICHAEL RODAK, JR.

No. A-63

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

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## QUESTION PRESENTED FOR REVIEW

Are claims of intentional gender-based wage discrimination, which do not meet the equal work standard of the Equal Pay Act, 29 U.S.C. § 206(d), actionable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1 to 2000e-17?

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No. A-63

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

---

# BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## STATEMENT OF THE CASE

Respondents Alberta Gunther, Velene Vallence, Marion Vander Zanden

and Yvonne Hatton were jail matrons employed by Washington County, Oregon. As matrons, their principal responsibilities were to process and guard female prisoners. On occasion, respondents transported prisoners, assisted in arrests, and processed records. They also performed duties relating to male inmates, including booking them in, taking mug shots, and fingerprinting.

Respondents' male counterparts in the jail performed essentially the same functions as matrons, but only with respect to male prisoners. Until June 1973, respondents' male counterparts were deputy sheriffs and deputy sheriff recruits who were assigned to the jail on a temporary rotating basis. Deputies were paid between $668 and $853 per month, and recruits received monthly salaries

ranging from $636 to $736, while the respondents were paid from $476 to $606 per month for their work. (Dist. Ct. Opinion at 4.)

Beginning in June 1973, deputies and recruits were phased out of jail duties and replaced by "corrections officers," a newly created position ostensibly open to both men and women. At that time corrections officers' monthly salaries ranged from $701 to $896, corrections officer trainees salaries ranged from $668 to $812 and matrons were paid from $525 to $668 per month.

In the spring and summer of 1973, the respondent matrons unsuccessfully pressed requests for equal pay with the Washington County Police Officers Association, the bargaining unit for County jail employees. A few months later,

Washington County closed the women's jail, boarded out its female prisoners in an adjoining county's facilities, and terminated the respondent matrons' jobs. Two other matrons who had not sought equal pay were transferred to other positions within the jails. At the time of respondents' discharge, the defendant sheriff completed personnel forms on which he stated that respondents should not be rehired in other capacities. The respondents' subsequent efforts to secure reemployment with the County were unsuccessful.

The respondents then filed this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1-- 2000e-17 (1976) and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976). They alleged generally that the defendant County and officers had denied them equal

pay for substantially equal work, that even if their work was not the substantial equivalent of that performed by the deputy sheriffs and corrections officers, some element of the disparity in compensation was solely attributable to discrimination on the basis of sex, and that the defendants had terminated and refused to rehire them in retaliation for their equal pay requests.

The district court entered judgment for the defendants. The court found that the matrons' work was not substantially equal to that performed by deputies and corrections officers and concluded that this resolution of the equal pay issue precluded further consideration of the alternative discriminatory compensation claim. The trial court also rejected respondents' retaliatory discharge claims.

The Court of Appeals for the Ninth Circuit affirmed the district court's disposition of the equal work and retaliatory discharge questions as not clearly erroneous. The court held, however, that the Equal Pay Act's equal work standard did not govern respondents' Title VII claim that differences in the compensation of male and female corrections personnel were, at least in part, attributable to sex discrimination. Gunther v. Washington County, 623 F.2d 1303 (9th Cir. 1979). The panel found that under the Bennett Amendment, 42 U.S.C. § 2000e-2(h), the Equal Pay Act's four affirmative defenses were incorporated into Title VII, but its equal pay formulation was not adopted as the controlling substantive standard for all wage discrimination claims under the Civil Rights Act. 623 F.2d at 1311-13,

1317-21. Accordingly, while equal pay claims under Title VII or the Equal Pay Act are tested against identical criteria, Title VII's broad remedial mandate affords relief for discriminatory compensation, even when claimants cannot establish substantial equality of employment. The court instructed the district court on remand to consider evidence of intentional sex discrimination in fixing the matrons' compensation.

The defendant County subsequently petitioned for rehearing. The appellate panel, in denying that petition, filed a supplemental opinion which comprehensively analyzed the interrelationship of the Equal Pay Act and Title VII. The court emphasized that it was not substituting a "comparable" work test for the "equal"

work standard, and that a Title VII plaintiff could not establish a prima facia case solely by alleging that her job requirements were comparable to those of similarly situated males. 623 F.2d at 1321. The court of appeals simply recognized a right of recovery under Title VII for claimants who demonstrate that they have been undercompensated because of intentional gender-based discrimination.

## REASONS FOR DENYING THE WRIT

The Ninth Circuit's holding does not conflict with decisions of other courts of appeal. Only one other appellate court, the Third Circuit, has squarely considered whether claims of intentional discrimination in compensation, which do not allege substantial equality of work, are cognizable under Title VII. That

court, citing the Gunther opinion favorably, resolved the issue consistly with the Ninth Circuit's holding. IUE v. Westinghouse Electric Corp., 23 F.E.P. Cases 588 (3d Cir. 1980). Allegedly conflicting decisions cited by the petitioners are, in fact, distinguishable from, and reconcilable with, Gunther. In Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), the court rejected a comparable work theory, a concept neither raised nor endorsed in Gunther. Petitioners also rely upon a number of cases in which plaintiffs raised conventional equal pay claims.[1] In those instances, the courts

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[1] DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1973); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); Calage University of Tennessee, 544 F.2d 297 (6th Cir. 1977); Orr v. MacNeill and Son, 511 F.2d 166 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).

had no occasion to consider whether claims of intentional pay discrimination between unequal jobs are cognizable under Title VII.

Nor does the Ninth Circuit's holding conflict with applicable decisions of this Court. In General Electric Co. v. Gilbert, 429 U.S. 125 (1976), this Court held that interpretations of the Equal Pay Act are applicable to Title VII claims when the coverage of the statutes intersects. But the Court did not limit Title VII's remedies for discriminatory compensation claims to those defined by the Equal Pay Act. Accordingly, while the Gunther panel followed Gilbert's teaching, it could, consistently, recognize a cause of action for intentional discrimination under Title VII.

This Court's decisions endorsing the in pari materia principle of

statutory construction do not apply here. Title VII, as construed by the Ninth Circuit, did not alter the scope of the Equal Pay Act; rather, it created remedies for discriminatory compensation in situations which are different from those addressed by the Equal Pay Act. That construction is consistent with the Court's direction that employment discrimination provisions, because of their broad remedial character, are to be regarded as complementary and supplementary. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48-49 & n.9 (1974).

The Court of Appeal's holding was correct. Only the Third and Ninth Circuits have considered whether Title VII affords a remedy for intentional wage discrimination when equality of work cannot be established. Both courts, after comprehensive, thoughtful consideration of

legislative and regulatory materials, concluded that Title VII provides such relief. No court has addressed, much less refuted, the reasoning of these opinions.

Finally, petitioners exaggerate, or perhaps misapprehend, the significance of the Ninth Circuit's holding. The court did not, as petitioners imply, endorse a concept of comparable work in Title VII wage discrimination actions. Indeed, the court explicitly stated that allegations of comparable work would not state a prima facia case under Title VII, and the issue of comparable work was never asserted by the plaintiffs either at trial or on appeal. The ruling below was quite limited: plaintiffs who establish that they have received lower wages because of intentional gender-based discrimination

are entitled to recover under Title VII. It is on this basis that respondents respectfully request the Court to consider the merits of the petition.

## I. THE NINTH CIRCUIT'S HOLDING DOES NOT CONFLICT WITH DECISIONS OF OTHER COURTS OF APPEAL.

Petitioners contend that the Ninth Circuit's decision in this case is contrary to the law of five other circuits. (Pet. 11-16) Close examination of the cases, however, shows this inter-circuit "conflict" to be illusive, not real. Only the Third Circuit has addressed the questions considered in Gunther, and that court's resolution of those issues paralleled the Ninth Circuit's.

Five of the ostensibly conflicting cases which petitioners cite involved conventional equal pay claims brought under Title VII. DiSalvo v. Chamber of

Commerce, 568 F.2d 593 (8th Cir. 1973); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); Calage University of Tennessee, 544 F.2d 297 (6th Cir. 1977); Orr v. MacNeill and Son, 511 F.2d 166 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971). The courts in these cases implied in dicta that Title VII plaintiffs must meet the Equal Pay Act's requirements if they are to prevail in wage discrimination actions. These courts, however, had no need to consider--and did not consider--whether a wage discrimination claim based on a theory other than equal pay must satisfy the standards of the Equal Pay Act. Significantly, the DiSalvo, Callage, Orr, and Amons

panels did not even address the relationship between Title VII and the Equal Pay Act under the Bennett Amendment, the crucial element of the Ninth Circuit's analysis.[2] Such ambiguous and poorly-considered dicta do not reflect a substantial or direct conflict among the courts of appeal.

Fundamental inter-circuit conflict, if any, must then be gleaned from the four decisions in which courts of appeal have considered whether wage discrimination claims that do not satisfy the Equal Pay Act's equal work criterion are cognizable under Title VII: Gunther; IUE v. Westinghouse Electric Corp., 23

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[2] The court in Laffey v. Northwest Airlines, supra, construed the Bennett Amendment as mandating the application of the same standards "in the relatively small area in which [the Equal Pay Act and Title VII] are congruent." 567 F.2d at 446. The Ninth Circuit endorsed this approach in Gunther.

FEP Cases 588 (3d Cir. 1980); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), petition for cert. filed, 49 U.S.L.W. 3031 (U.S. July 18, 1980) (No. 80-82); and Stastny v. Southern Bell Telephone & Telegraph Co., ____ F.2d ____ (4th Cir. July 28, 1980). IUE v. Westinghouse Electric Corp., as petitioners concede, is consistent with Gunther. So the quest for conflict must focus on Lemons and Stastny.

The plaintiff nurses in Lemons did not allege the city had intentionally discriminated between its male and female employees. Instead, they sought relief under a comparable work theory, asserting that the city's classification and pay plan perpetuated historical gender-related inequities in compensation by fixing the

compensation of public employees by reference to the pay for like work in the community. The plaintiffs argued that their positions should be classified and their wages fixed, not by comparison with other nurses in the community, but by reference to non-nursing administrative positions within the city. The Tenth Circuit rejected this comparable work approach.

Respondents in this case did not assert a comparable work concept. Nor did the Ninth Circuit's holding endorse such an approach. Instead, the court ruled that intentional wage discrimination is actionable under Title VII, a question not before the Lemons panel. There is no conflict.

The significance of Stastny v. Southern Bell is less certain. That case has many of the hallmarks of the equal

pay-based decisions discussed above;[3] indeed, Judge McMillan's opinion for the district court includes a heading titled "Back pay on account of failure to pay women equally for equal work." 458 F.Supp. 314, 352 (W.D.N.C. 1978). However, the district court opinion also described willfull and pervasive discrimination by the defendant. It is unclear whether plaintiffs asserted intentional discrimination as a basis for recovery, independent of their equal pay claims. Consequently, it is unclear from the Fourth Circuit's summary treatment of

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[3] DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1973); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978); Calage University of Tennessee, 544 F.2d 297 (6th Cir. 1977); Orr v. MacNeill and Son, 511 F.2d 166 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971).

the individual plaintiffs' wage claims whether the court rejected intentional discrimination as a separate basis for recovery or simply held that the plaintiffs had not established the requisite equality of work for an equal pay claim under Title VII. Any conflict with Gunther is, at most, implicit.

It is striking that although Lemons was decided after the original opinion in Gunther, and Stastny after the issuance of the supplemental opinion, panels in neither case referred to the Ninth Circuit's holding. This is significant in two respects. First, it may indicate that the Fourth and Tenth Circuits viewed their cases as so distinguishable from Gunther that they perceived no conflict. Conversely, it may show that neither of those courts was aware of the

Ninth Circuit's reasoning and therefore did not have the benefit of it. If so, even if there is true conflict among the courts of appeal, the Fourth and Tenth Circuits should be given an opportunity to reconsider their positions in light of the comprehensive analysis presented in Gunther and IUE v. Westinghouse Electric Corp. Such reconsideration might well preclude the need for review by this Court.

## II. THE NINTH CIRCUIT'S HOLDING IS CONSISTENT WITH THE DECISIONS OF THIS COURT.

Petitioners contend that the holding below conflicts with General Electric Co. v. Gilbert, 429 U.S. 125 (1976), and with other decisions of the Court in applying the in pari materia canon of statutory construction. This contention, like petitioners' allegations of conflict

among the courts of appeals, reflects a fundamental misunderstanding of the nature of the Ninth Circuit's ruling. In General Electric Co. v. Gilbert, the Court found that denial of disability benefits to female employees who were absent from work as a result of pregnancy did not violate Title VII because that denial was "based on a factor other than sex," an affirmative defense under section 6(d)(1) of the Equal Pay Act, 29 U.S.C. § 206(d)(1), incorporated into Title VII through the Bennett Amendment. The Court did not, however, hold that, in addition to incorporating the Equal Pay Act's affirmative defenses under Title VII, the Bennett Amendment also limits Title VII wage discrimination actions to those satisfying the Equal Pay Act's equal work requirements. Gilbert does

not compel such a broad construction of the Bennett Amendment.

The Gunther panel, consistent with Gilbert, read the Bennett Amendment as incorporating affirmative defenses under the Equal Pay Act into Title VII. 623 F.2d at 1312. Accord, Manhart v. City of Los Angeles Dept. of Power and Water, 553 F.2d 581 590 (9th Cir. 1977). The court further emphasized, again consistent with Gilbert, that the Equal Pay Act and Title VII should be construed harmoniously when their coverage overlaps; equal pay claims under either provision are to be tested against the same standards. 623 F.2d at 1313, 1321. The Ninth Circuit's construction of Title VII and the Bennett Amendment was not, then, contrary to Gilbert. The Court of Appeals, in recognizing a separate cause of action

for intentional wage discrimination under Title VII, decided an issue that this Court had neither considered nor resolved.

Petitioners' analysis regarding in pari materia construction is similarly flawed. That principal of statutory interpretation is triggered only when broad application of a general statute would alter or nullify the effect of a more specific provision. Radzanower v. Touche, Ross & Co., 426 U.S. 148, 153 (1976). Here, the Ninth Circuit's interpretation of Title VII did not affect the application of the Equal Pay Act. Contrary to petitioners' assertion (Pet. 21-23), the court did not effectively repeal the Equal Pay Act's equal work standard by recognizing a comparable work standard for equal pay actions under Title VII. The court explicitly disavowed that result. The

Ninth Circuit preserved the equal work requirement, while construing Title VII as providing supplemental relief for certain non-equal pay related claims. This expansive reading of Title VII is consistent with this Court's direction that remedies for discrimination should be construed as complementary. Alexander v. Gardner-Denver Co., 415 U.S. 36, 47 (1974). Principles of in pari materia do not apply.

## III. THE COURT OF APPEALS CORRECTLY CONSTRUED TITLE VII.

The most compelling validation of the Ninth Circuit's reading of Title VII is the result petitioners' alternative, contrary, construction would sanction. If, as petitioners suggest, Title VII's coverage of pay claims is limited to situations where the plaintiff can show equal work by men, employers

would be free to establish pay rates for jobs based solely on the gender of the incumbents, without regard to the nature of the work. As the Third Circuit observed, Title VII bars this type of intentional wage discrimination on the basis of race, color, religion, or national origin.[4] IUE v. Westinghouse Electric

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[4] Section 703(a), 42 U.S.C. §2000e-2(a) provides:

> (a) It shall be an unlawful employment practice for an employer--
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
>
> (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend

Corp., 23 FEP Cases at 592. The essential inquiry in interpreting Title VII, particularly the Bennett Amendment, is whether Congress intended to insulate such intentional discrimination against women.

The Bennett Amendment, 42 USC § 2000e-2(h), provides:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

Discrimination in compensating employees of the opposite sex who perform equal

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4 (cont'd)
to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

work is "authorized" by the Equal Pay Act only if it is attributable to seniority, merit, output, or some factor other than sex. 29 U.S.C. § 206(d)(1).[5] Nothing

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[5] 29 U.S.C. § 206(d) provides in pertinent part:

> (d)(1) No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill. effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

in the Equal Pay Act authorizes--in its clearest sense, positively sanctions--discrimination which does not fall within its terms. The authorization language of the Bennett Amendment reflects a legislative intent to incorporate the Equal Pay Act's four affirmative defenses, not to adopt equal work-equal pay as the sole measure of wage discrimination under Title VII.

Legislative commentary concerning the Bennett Amendment is, at best, murky. As the Third Circuit noted in IUE v. Westinghouse Electric Corp., "an ingenious and intelligent mind may find support in all of [the legislative materials]" for either of the contending constructions. 23 F.E.P. Cases at 594. And petitioners have demonstrated great ingenuity.

The most plausible reading of the limited legislative history is that in areas of overlap between Title VII and the Equal Pay Act--equal pay actions under Title VII--Congress intended the Equal Pay Act's affirmative defenses, with corresponding judicial and administrative interpretations, to apply. This construction, adopted by the Third and Ninth Circuits, finds support in Senator Dirksen's observation that "[a]ll that the pending amendment does is recognize these exceptions [under the Equal Pay Act], that are carried in the basic Act," and in Senator Bennett's statement that the amendment was designed "to provide in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13647 (1964). Nothing in the contemporaneous legislative

history expresses a clear congressional desire to treat intentional gender-related wage discrimination differently than intentional discrimination on other bases. If, as petitioner contends, Congress had intended to so substantially qualify the remedial mandate of the Civil Rights Act, it would have done so explicitly.

The Ninth Circuit's interpretation of the Bennett Amendment is also consistent with applicable administrative regulations. 29 C.F.R. § 1604.8, issued by the Equal Employment Opportunity Commission in 1972, provides in relevant part as follows:

> Relationship of Title VII to the Equal Pay Act.
>
> (a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of the other prohibitions contained in Title VII and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act.

While the force of this interpretation is somewhat diminished because it was not contemporaneous, it is entitled to great deference under the criteria defined in General Electric Co. v. Gilbert, 429 U.S. at 140-44 (1976). See Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971). Contrary to petitioners' contention, this regulation, unlike the EEOC regulation considered in Gilbert, does not "flatly contradict" an earlier EEOC pronouncement.

In 1965 the Commission published a regulation, formally codified at 29 C.F.R. § 1604.7, which read in relevant part as follows:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938. 29 U.S.C. 206(d) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are

> applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

30 Fed. Reg. 14928 (1965). The language of the last sentence of this regulation is nearly identical to that of 29 C.F.R. § 1604.8(a) set out above. Title VII and the Equal Pay Act are to be construed harmoniously, but the terms of the latter do not define the scope of the former. The Commission's interpretations of Title VII are consistent and authoritative.

The Ninth Circuit's reading of the Bennett Amendment is in accordance

with that provision's plain language, its legislative history, and its administrative application. It effectuates, rather than qualifies, Title VII. The court correctly rejected petitioners' position.

## CONCLUSION

The petition for a Writ of Certiorari should be denied.

Respectfully submitted,

LINDSAY, HART, NEIL & WEIGLER

By_____

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No. 80-429

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
ON APPEALS FOR THE NINTH CIRCUIT

# PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

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IN THE

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THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

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---

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
ON APPEALS FOR THE NINTH CIRCUIT

# PETITIONERS' REPLY TO RESPONDENTS' BRIEF IN OPPOSITION

Petitioners have received a Brief in Opposition filed by respondents herein, and reply thereto as follows:

## I. RECHARACTERIZATION OF THE QUESTION PRESENTED FOR REVIEW

Respondents attempt to state the question presented for review in a manner that appears more narrow than in fact is the case by referring to "intentional gender-based wage discrimination" (Brief in Opposition at i) and denying that they have asserted a comparable work concept (Brief in Opposition at 17).

Notwithstanding the respondents' assertions and the court's disclaimer (Petition App. at 17a-18a), the holding of the Ninth Circuit in this case does permit sex-based wage discrimination claims based upon a comparable work theory and any other theory that a claimant may devise. This conclusion is discussed in section II below under the heading of conflict among the courts of appeals.

For the purpose of fairly stating the scope of the question presented for review by the petitioners it is also important to examine the nature of the claim made by respondents. They have never asserted anything more than the conclusion that some portion of the difference in pay between the deputy sher-

iffs and corrections officer on the one hand and themselves on the other must be attributed to sex discrimination. Brief in Opposition at 5. Implicit in the conclusion is the further conclusion that the difference in difficulty and therefore worth of the jobs is less than the difference in pay. Respondents claim might be described as seeking "almost equal" pay for "almost comparable" work. It clearly relies upon an evaluation of the relative difficulty of unequal jobs together with the presumption that failure to pay in accordance with that evaluation consitututes a violation of Title VII.

## II. CONFLICT AMONG THE COURTS OF APPEALS

Contrary to respondents' Brief in Opposition at 8-9 and 13-20, there is a conflict among the courts of appeals as to the proper interpretation of the second sentence of Section 703(h) of Title VII, 42 U.S.C. §2000e-2(h), known as the Bennett Amendment. As discussed in the petition at 11-12, the courts of appeals for the Fourth, Fifth, Eighth, Tenth and

District of Columbia Circuits have held that by virtue of the Bennett Amendment a sex-based wage discrimination claim brought under Title VII must meet the Equal Pay Act's equal pay for equal work standard. Stastny v. Southern Bell Telephone Co., 23 F.E.P. Cases 665 (4th Cir. 1980); Orr v. Frank MacNeill & Son, Inc., 511 F.2d 166 (5th Cir. 1975); cert. denied, 423 U.S. 865 (1975); DiSalvo v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593 (8th Cir. 1978); Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), cert. denied, 49 U.S.L.W. ____ (U.S. October ____, 1980); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976); cert. denied, 434 U.S. 1086 (1978). These decisions interpret the Bennett Amendment to incorporate the Equal Pay Act's equal work standard into Title VII.

In contrast, the Ninth Circuit in the instant case, 623 F.2d at 1319, and the Third Circuit in IUE v. Westinghouse Electric Corp., 23 F.E.P. Cases 588, 596 (3d Cir. 1980), petition for rehearing pending, have interpreted the Bennett

Amendment to incorporate the Equal Pay Act's affirmative defenses into Title VII, but not the Equal Pay Act's equal work standard. The conflict is clear and irreconcilable.

Respondents suggest (Brief in Opposition at 13-14) that the courts in DiSalvo, supra, Laffey, supra, Orr, supra, Ammons, supra, and the Sixth Circuit in Calage v. University of Tennessee, 544 F.2d 297 (6th Cir. 1977), have applied the equal work standard to Title VII sex-based wage discrimination claims only because the plaintiffs sought equal pay for the performance of equal work -- and that those courts would not have applied the equal work standard had plaintiffs alleged some other theory of liability. However, those courts applied the equal work standard irespective of plaintiffs' allegations because the Bennett Amendment requires plaintiffs to meet the burden of showing the performance of equal work. DiSalvo, supra, 568 F.2d at 596; Laffey, supra, 567 F.2d at 446; Orr, supra, 511 F.2d at 171; Ammons, supra, 448 F.2d at 120; Calage v. University of Tennessee, 400 F. Supp. 32, 37 (E.D. Tenn. 1975),

aff'd, 544 F.2d 297, 302 (6th Cir. 1976). The wage discrimination claims in Orr, supra, Ammons, supra and Calage, supra, were not limited to allegations concerning performance of equal work, yet the courts entered judgment against plaintiffs with respect to all of their claims for failure to meet the equal work standard.[1]

[1]In Orr, supra, the female plaintiff conceded that her job was different than those of higher paid males, but attempted to show that she had suffered discrimination with respect to pay by offering evidence, credited by the district court, that the person who set her compensation had admitted he would not pay plaintiff as much as a man. 511 F.2d at 169-70. Despite this evidence of "intentional" discrimination, the Fifth Circuit held that plaintiff had not established a claim under Title VII because she had not "sustained her burden of proving equal work." Orr, supra, 511 F.2d at 171. Similarly, in Ammons, supra, the female plaintiff alleged wage discrimination under Title VII because she purportedly had been denied a security clearance to a restricted area of the plant and, therefore, earned less pay than certain males who had received security clearances. 448 F.2d at 118-119. However, the Tenth Circuit held that "to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal work'". Id. at 120. And since plaintiff had not shown

Furthermore, respondents' argument (Brief in Opposition at 16-17) that the claim in this case is different than the claim raised in Lemons, supra, is belied by the facts herein. As noted above and like the nurses in Lemons, supra, the

(cont.)
that her job was equal to higher paid jobs performed by males, the Tenth Circuit affirmed the district court's denial of plaintiff's claim. Id. Finally, in Calage, supra, the female plaintiff did not contend that she had performed the same job as higher paid men, but rather contended that her job was of the same value to her employer as other jobs held by men listed at the same level as plaintiff's job on the employer's organization chart. 400 F.Supp. at 37. The district court in Calage dismissed plaintiff's claim due to her failure to establish a violation of the equal pay for equal work standard. Id. Although the plaintiff in Calage did not question the application of the equal work standard on appeal, the Sixth Circuit cited Orr, supra, with approval as setting forth the proper standard for adjudicating Title VII sex-based wage discrimination claims. 544 F.2d at 302. See also, Keyes v. Lenoir Rhyne College, 23 WH Cases 319 (W.D.N.C. 1976), aff'd, 552 F.2d 579 (4th Cir. 1977), cert. denied, 434 U.S. 904 (1977) (Claim based on a statistical study showing female faculty members earned less on the average than male faculty members rejected because plaintiff did not meet the equal work standard).

respondents herein seek to establish sex-based wage discrimination by comparing their jobs to different, higher-paid jobs. The nurses in Lemons, supra, sought the same pay as that accorded to jobs in other professions, allegedly because the nurse jobs were comparable in terms of education requirements, that etc., to jobs such as buyer or accountant. 620 F.2d at 229. In this case respondents intend to compare the pay levels as well as the relative difficulty of unequal jobs. Petition App. at 69a. The fact that the Tenth Circuit held that the claim in Lemons, supra, was not actionable under Title VII, and the Ninth Circuit in this case held that the claim was actionable, establishes that a conflict among the circuit courts exists over the proper interpretation of the Bennett Amendment.

Moreover, respondents' (Brief in Opposition at 17) and the Ninth Circuit's (Petition App. at 17a-18a) contentions that the Ninth Circuit's analysis of the Bennett Amendment in this case would not allow Title VII plaintiffs to assert claims of equal pay for comparable work is incorrect. Unless

the equal work limitation applies to Title VII claims and unless the two statutes are read in pari materia there would be nothing to prevent a plaintiff from asserting a wage claim based on any theory, including the so-called comparable work theory.[2] The Supplemental

[2]This point was recognized by Judge Van Dusen in his dissent in Westinghouse, supra, 23 F.E.P. cases at 600 n. 6:

> "Even if the majority's perception of this case, that it raises only the question of whether sex-based wage discrimination can be proved by way of statements of intentional wage discrimination in the absence of an equal work violation, is correct, the majority's analysis will permit sex-based wage discrimination claims to be brought solely on the basis of evidence of comparable work. By interpreting the Bennett Amendment to refer only to the four exceptions in the Equal Pay Act and by holding that Title VII need not be read in pari materia with the Equal Pay Act, the majority has necessarily decided that Title VII's prohibition against sex discrimination in wages is not limited by the Equal Pay Act's equal work requirement. Accordingly, we must confront the comparable work issue in this case.

Opinion of the Ninth Circuit in this case did not reject the statement in the initial Opinion that

> "...in a situation where primarily women are employed in a type of job that is comparable but not substantially equal to that performed by men, an employer is free under the Equal Pay Act to decrease the wages of the women solely because of their sex. Such a practice is prohibited by the plain language of §703 and will continue to be under our interpretation of the Bennett Amendment." Petition App. at 54a.

Respondents' attempt to diminish the conflict between Stastny, supra and the instant decision of the Ninth Circuit by suggesting that the Fourth Circuit was not aware of the Ninth Circuit's decision in this case. Brief in Opposition at 19-20. The plaintiff in Stastny, supra, petitioned the Fourth Circuit for rehearing alleging a conflict between the panel's decision in Stastny and the Ninth Circuit's decision in this case (as well as the Third Circuit's decision in Westinghouse, supra). The petition for rehearing was denied on September 8, 1980. Thus, the Fourth Circuit has considered the Gunther and Westinghouse

decisions, has been given an opportunity to conform its interpretation of the Bennett Amendment to that of the Third and Ninth Circuits, but has declined to change its approach. The Ninth Circuit also declined to reconsider its decision in this case. Contrary to the Brief in Opposition at 20, there is no indication that the courts of appeals will reach a common interpretation of the Bennett Amendment absent a determination by this Court of the question presented.

## III. CONFLICT WITH SUPREME COURT DECISIONS

The Ninth Circuit's decision herein is in conflict with this Court's decisions. The Brief in Opposition (at 21) attempts to distinguish the Court's opinion in General Electric Co. v. Gilbert, 429 U.S. 125, 144 (1976), by suggesting that the Court's interpretation of the Bennett Amendment -- "[b]ecause of this amendment, interpretations of §6(d) of the Equal Pay Act are applicable to Title VII as well. . ." -- referred to an Equal Pay Act affirmative defense and not to the equal work stand-

ard. In General Electric, supra, the Court quoted from and relied upon an interpretative regulation (29 CFR §800.116(d) (1975)) by the Wage and Hour Administrator of the Equal Pay Act's core equal pay for equal work standard. 429 U.S. at 144. It was this interpretation of the equal work standard that the Court held was applicable to Title VII by virtue of the Bennett Amendment. There was no reference to any of the Equal Pay Act's affirmative defenses.The General Electric decision is in conflict with the Ninth Circuit's decision herein.

The Ninth Circuit's decision is also clearly in conflict with this Court's decisions concerning in pari materia statutory construction. See, United States v. United Continental Tuna Corp., 425 U.S. 164, 169 (1976); Train v. Colorado Pub. Int. Research Group, Inc., 426 U.S. 1, 24 (1976); Radzanower v. Touche, Ross & Co., 426 U.S. 148 (1976). Respondents recognize that it is improper to apply a general statute in a manner that would alter or nullify the effect of a more specific statute. Brief in Opposition at 23. But respondents have not explained why the Ninth Circuit's

construction of Title VII (the general statute) has not nullified the Equal Pay Act (the specific statute applying to wage discrimination). In fact, the Ninth Circuit has nullified the Equal Pay Act, by deciding that any plaintiff who alleges that wage discrimination is "intentional" can assert a claim under Title VII and ignore the Equal Pay Act's equal work requirement. Under that construction of Title VII, few, if any, plaintiffs would ever choose to meet the equal work standard.

This Court's decision in Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), does not support respondents' position. The decision in Alexander, supra, held that an employee does not waive his opportunity to proceed in federal court under Title VII by raising a claim before an arbitrator. 415 U.S. at 49. However, this Court made clear in Great American Federal Savings & Loan Assoc. v. Novotny, 442 U.S. 366, 378 (1979), that the decision in Alexander, supra, was not authority for expanding the substantive meaning of a statute. Rather, the Court held in Novotny that the critical inquiry with respect to

substantive statutory interpretation is to determine and effectuate the intent of Congress. Id. As shown in the petition at 21-22 and 25-31, the intent of Congress concerning the Equal Pay Act was to limit the involvement of the courts and the government in the wage area to the equal work situation and later to incorporate the equal work standard into Title VII as a limitation on sex-based wage discrimination claims.

## IV. INCORRECT DECISION

The Ninth Circuit incorrectly decided this case. Congress devoted countless hours in hearings and deliberations over the Equal Pay Act to develop the equal pay for equal work approach. Congress considered and specifically rejected proposals that would have allowed claims for "intentional" discrimination, equal pay for jobs of equal value and equal pay for comparable work, among others.[3] The decision in this case

[3]For example, the very claim raised in Westinghouse, supra, had been advanced by the IUE before Congress during hearings over the Equal Pay Act. Hearings on H.R. 8898 and H.R. 10226

renders meaningless all of the careful deliberation over the equal work standard. Respondents suggest (Brief in Opposition at 24) that the destruction of the equal work limitation is the most compelling reason to uphold the Ninth Circuit's approach. However, respondents should address their concern to

(cont.)
before the Select Subcommittee on Labor of the House Committee on Education and Labor, 87th Cong., 2d Sess., Part 1 at 175-189. In 1962, the IUE argued in favor of a bill calling for equal pay for comparable work because the Union believed such a bill would remedy the practice of separate wage scales for men and women, a practice not uncommon in industry decades ago. Id. In spite of these types of arguments, however, Congress decided not to allow the government and the courts to restructure the wage scales of employers even if there had been a history of separate wage scales for men and women. Rather, Congress chose to limit wage discrimination claims to situations where equal work had been performed. And a year later in enacting Title VII, Congress ensured that women, Blacks, etc., would have fair opportunities to obtain higher paying jobs. Thus, when the Third Circuit in Westinghouse, supra, allowed the IUE to assert under Title VII the very claim rejected by Congress during consideration of the Equal Pay Act, the Third Circuit acted contrary to express Congressional intent.

Congress and not the courts, since the enactment of the equal work limitation was a deliberate legislative act which the courts are bound to enforce.

Moreover, respondents' suggestion that incorporation of the equal work standard into Title VII would deprive women of a right (the assertion of "intentional" wage discrimination claims) that Title VII provides to minority groups is not persuasive. Brief in Opposition at 25. We know of no Title VII case that allowed any minority group member to sustain a claim of wage discrimination similar to respondents'. Historically the problem of separate wage rates has been sex related. During consideration of the Equal Pay Act and Title VII Congress was not presented with allegations concerning separate wage schedules for Catholics or Protestants, Italians or Germans, Jews or Gentiles, or Blacks or Whites. Members of minority groups had been denied access to higher paying jobs, but there was no common practice of establishing separate wage schedules for such groups as there had been for women.

Thus, the Congress was not without

reason to view wage discrimination as a sex-based problem and to address the Equal Pay Act and the Bennett Amendment to that problem. Its response was the equal work standard and there is no suggestion in the legislative history of the Equal Pay Act or Title VII that Congress believed some other standard should apply for claims of wage discrimination based on ethnic, racial or religious grounds. The fact that Congress did not consider wage discrimination concerning minority groups as a widespread problem and did not specifically address such claims is no reason to reject Congress' response to the wage discrimination problem it did consider under the Equal Pay Act and the Bennett Amendment.

In 1965 the Equal Employment Opportunity Commission adopted an interpretive regulation which petitioners contend provides that the Bennett Amendment incorporated the equal work standard into Title VII. 29 CFR §1604.7 set forth in the petition at 32-33. Petitioners noted that the EEOC modified its position in a 1972 regulation which replaced the original regulation but

showed that the more contemporaneous enactment is entitled to greater weight. Petition at 33. Respondents attempt to show that the two regulations are consistent by comparing an irrelevant provision relating to the scope of employee coverage. Respondents fail to address the pertinent language of the 1965 regulation which the Ninth Circuit has misinterpreted. Respondents Brief in Opposition at 30-32.

Additional material showing that the Ninth Circuit incorrectly interpreted the position of the EEOC prior to 1972 and partially in reliance thereon incorrectly decided this case has recently been provided to petitioners by the employer in Westinghouse, supra. A 1967 opinion letter issued by General Counsel of the Equal Employment Opportunity Commission which interprets the Bennett Amendment as incorporating the equal work standard as well as the Equal Pay Act's affirmative defenses was found a few days after the Third Circuit issued its decision in Westinghouse, supra, and was used as a basis for the petition for rehearing filed in that case. The opin-

ion letter, after quoting the Bennett Amendment, states:

> "Differentiations which are authorized under said Section are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.
>
> "It is the interpretation of these provisions that requires harmonization between Title VII and the Equal Pay amendment to the FLSA, because these are the provisions which, within the meaning of Section 703(h), 'authorize' differentiations." (emphasis added, full text set forth in the appendix hereto)

Thus, in addition to the 1965 regulation the EEOC recognized in the 1967 opinion letter that Congress intended the word "authorized" in the Bennett Amendment to incorporate the equal work standard into Title VII, as well as the affirmative defenses. Respondents' contention that the EEOC has had a "consistent" view of the Bennett Amendment is obviously incorrect.

Finally, we note that Respondents

have not argued that the issue involved herein is not important. It is obviously important as was shown in the petition at 34-38.

For the reasons stated above and in the petition, the petition for writ of certiorari should be granted.

Respectfully submitted
Lawrence R. Derr

# APPENDIX

UNITED STATES GOVERNMENT
MEMORANDUM

TO: Tom E. Robles
Director, Albuquerque RO

FROM: Kenneth F. Holbert
Acting General Counsel

DATE: June 6, 1967

SUBJECT:

Applicability of Section 800.108 of Administrators Interpretative Bulletin on Equal Pay for Equal Work, Part 800 to Proceedings under Title VII of the Civil Righst Act of 1964 in Light of the Commission Guidelines on Sex Discrimination, Part 1604 Commission Procedural Regulations, Section 1604.7.

The following question has been raised before your office: A privately-owned public utility operating within your region has multiple offices. A charge of discrimination has been filed by a female employee operating in one office building in a large city. The basis of the charge is that she is paid less for performing similar work to that

performed by male employees because of her sex. The male employees with whom she is being compared are employed in a separate building which is located approximately two miles away from the site of the employment of the Charging Party. Under the above-cited Interpretative Bulletin of the Administrator, Wage and Hour Division, as explained in the Administrative Opinion of the Administrator of June 17, 1966, (BNA, FEP 401:739), and as applied by the Administrator in similar situations, the male employees are located in a separate establishment from the female employee within the meaning of the Equal Pay provision of the Fair Labor Standards Act. Therefore, no comparison of the wages of said male and female employees may be made for the purposes of determining a violation of the Equal Pay provisions of the FLSA.

You raise the question whether the concept of "establishment" and related administrative interpretations and opinions under the Equal Pay provisions of the FLSA constitute "relevant interpretations" within the meaning of Section 1604.7 of the Procedural Regula-

tions of the Commission, so that the Commission is bound by said opinions and interpretations.

It is concluded that Section 800.108 of the Interpretative Bulletin of the Administrator and opinions issued thereunder do not constitute "relevant interpretations" within the meaning of the Commission Procedural Regulations cited above, and that in processing cases alleging discrimination in pay based on sex, the Commission is not restricted to a comparison of rates in the same "establishment" of a multi-establishment employer.

The "relevant interpretations" of the Equal Pay Act to which the Commission regulations speak are those dealing with the measurement process in determining whether there is equal pay for equal work, within the area in which the FLSA and the provisions of Title VII overlap. This means that in situations to which both statutes are applicable, the same standards and rules shall be applied to determine whether there is "equal pay for equal work". However, as Section 1604.7 of our Procedural Regulations suggests, the regulation was not

intended to restrict the coverage of Title VII to those situtations where the FLSA is not applicable. The Equal pay provisions of the FLSA are applicable only within the limits of an establishment as that term is used in the statute, and as it has been interpreted. The concept of an "establishment" is foreign to Title VII. Title VII contains no such limitation unless it is found in Section 703(h) which provides:

> It shall not be an unlawful employment practice under this Title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the FLSA of 1938 as amended.

Differentations which are authorized under said Section are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor that sex.

It is the interpretation of these

provisions that requires harmonization between Title VII and the Equal Pay amendment to the FLSA, because these are the provisions which, within the meaning of Section 703(h), "authorize" differentiations. The Equal Pay amendment does not authorize sex discrimination between employees in different establishments, wihin the meaning of Section 703(h).

It simply does not deal with such discrimination. No affirmative Congressional intent to authorize discrimination on the basis of sex between employees in different establishments may be read into Section 703(h), or into Section 1604.7 of the Procedural Regulations of the Commission. Accordingly, the concept of "establishment" and its interpretations and limitations are not applicable to proceedings under Title VII.

Supreme C
F I L
DEC 3

No. 80-429

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF FOR PETITIONERS

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## QUESTION PRESENTED FOR REVIEW

Whether sex-based wage rate discrimination claims are subject to a different standard of proof, when such claims are asserted under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§2000e-1 to 2000e-17 (1976), than the equal pay for equal work standard applicable to claims presented under the Equal Pay Act, 29 U.S.C. §206(d)?

## PARTIES TO THE PROCEEDING BELOW

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are listed in the caption to this Brief.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 20a) and its supplemental opinion on denial of rehearing (Pet. App. 1a) are reported at 623 F.2d 1303. The court of appeals' judgment reverses in pertinent part the decision of the United States District Court for the District of Oregon (Pet. App. 57a) which is not yet officially reported but is unofficially reported at 20 F.E.P. Cases 788.

## JURISDICTION

The judgment of the court of appeals was entered on August 16, 1979. the court of appeals' order denying the petition for rehearing and suggestions for rehearing in banc was filed on May 1, 1980. On July 21, 1980, Mr. Justice Rehnquist extended the time for filing a petition for a writ of certiorari to September 2, 1980. Petitioners filed a petition for writ of certiorari on September 2, 1980. This Court granted the petition for writ of certiorari on November 3, 1980. The jurisdiction of

this Court is invoked under 28 U.S.C. §1254 (1).

## STATUTES AND REGULATIONS INVOLVED

The statutes involved are as follows: Section 6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d)(1); Section 703(a)(1) of Title VII of the Civil Rights Act of 1964 ("Title VII"), 78 Stat. 255, 42 U.S.C. §2000e-2(a)(1); and Section 703(h) of Title VII, 78 Stat. 255, 42 U.S.C. §2000e-2(h), the last sentence of which is known as the Bennett Amendment. The regulations involved are two regulations of the federal Equal Employment Opportunity Commission ("EEOC"): (1) 29 C.F.R. §1604.7(a) (1966), part of the EEOC's "Guidelines on Discrimination Because of Sex", initially published at 30 Fed. Reg. 14928 (1965); and (2) 29 C.F.R. §1604.8 (1979), issued on April 5, 1972 and originally published in 37 Fed. Reg. 6836 (1972). These statutes and regulations are set forth in App. A hereto.

## STATEMENT OF THE CASE

The underlying dispute in this case relates to a pay differential between the "Matron" job respondents performed and the "Corrections Officer"[1/] job performed by certain male employees.[2/] Respondents initially alleged in the Complaint and Pretrial Order that the County had violated Title VII by denying Matrons the same pay received by the Corrections Officers, assertedly because the Matron job and Corrections

1 The Corrections Officer job was initially performed by deputy sheriffs and later by Corrections Officers who were not deputies. The ultimate conclusions of the lower courts were the same with respect to both classifications. They are referred to herein under the single title of Corrections Officer.

2 Matrons' duties included guarding female prisoners at the Washington County jail, while Corrections Officers guarded male prisoners at the jail. (Pet. App. 59a). As shown below, while the two jobs involved some similar duties, the jobs were not substantially equal when all job duties were considered, as found by the district court and affirmed by the Court of Appeals (Pet. App. 68a, 27a-28a).

Officer job were substantially equal. (J. A. 1,11).[3/] However, in their post trial brief the respondents also contended that even if the Matron job and Corrections Officer job were not substantially equal, the County had still violated Title VII since the pay differential between the jobs was too great based on respondents' assessment of the relative difficulty of the jobs. (Pet App. 69a)

The district court found that the Matron job was not substantially equal to the Corrections Officer job because of the differences in the number of prisoners guarded and the fact that the matrons actually performed clerical work much of the time. (Pet. App. 59a-60a,

3 The district court held that it had jurisdiction of the suit under Title VII (Pet. App. 65a-66a). In addition to their alleged wage rate discrimination claim, the respondents also claimed that the County in violation of Title VII had terminated and refused to rehire them because they had sought equal pay. The district court found in favor of the County with respect to those claims (Pet. App. 70a-73a) and the court of appeals affirmed (Pet. App. 43a-49a). Respondents did not seek review in this Court of any part of the judgment below.

68a-69a) Accordingly, the district court dismissed the claim alleged in the Complaint. (Pet. App. 68a-69a, 73a) With respect to the respondents' alternative claim -- that the County had vilated Title VII with respect to the wage rates even if the jobs were not substantially equal -- the district court held that claims of sex-based wage discrimination under Title VII must meet the Equal Pay Act's "equal work" standard. The district court dismissed the alternative claim as a matter of law since the two jobs were substantially dissimilar. (Pet. App. 70a).

The court of appeals held that the district court was correct in finding that the comparison jobs were not substantially equal (Pet. App. 27a-30a). However, the court of appeals decided that even though respondents could not satisfy the "equal work" standard they should be permitted to show that they were entitled to higher pay under some other, unspecified standards. Accordingly, the court of appeals reversed the dismissal of respondents alleged wage rate claim and ordered the district court on remand to consider respondents'

allegation "that a portion of the discrepancy between their salaries and those of the male guards could be ascribed only to sex discrimination." (Pet. App. 39a). In the Supplemental Opinion On Denial Of Rehearing the court of appeals indicated that if female employees could show a violation of the equal pay for equal work standard they could prevail under Title VII, but if they could not show equal work then they still might obtain recovery under other unspecified theories. (Pet. App. 17a-18a).

## SUMMARY OF ARGUMENT

The legal issue presented by this case is an important one since it will determine whether the federal judiciary will become involved in adjudicating sex-based wage rate discrimination claims, other than in situations where men and women are alleged to be performing the same job but are being paid differently. Until the decision below, no court had held that such involvement was proper. Such involvement would be a significant departure from the role that

until now has been played by the federal courts. In administering the equal work standard, which was set forth in the Equal Pay Act and has previously been viewed as incorporated into Title VII, the federal bench has not been determining the wage rate that is proper for any particular job nor has it been adjudicating the amount of the wage differential that would be appropriate between two different jobs. Rather it has been assuring that whenever a male and female are performing the same work they are paid equally. The social, political, and economic consequences of involving the federal judiciary in determining the propriety of wage rate relationships between different jobs and in adjudicating the legality of an employer's wage structure are obviously very serious, as discussed infra at 14-31 and 98-109. If the equal work standard is abandoned as a limitation upon the type of sex-based wage discrimination claims that can be asserted under Title VII, the federal courts will inevitably become tribunals for complex, and often massive, job evaluation trials to attempt to discern whether it was sex discrimi-

nation or some non-discriminatory factor that caused the wage levels to be set where they are.

Respondents and the Ninth Circuit presumably would argue that the dangers of potential sex discrimination are great enough to outweigh the social, political, and economic concerns which militate against such federal involvement in wage setting. However, those arguments should be addressed to Congress, rather than the Courts. Congress is the appropriate forum to evaluate such social, political, and economic considerations And, as we discuss below, Congress has already formulated its judgment on this very issue in the early 1960's. The Ninth Circuit failed to consider much of the relevant legislative history of this point, particularly the directly relevant legislative history of the Equal Pay Act.

In its eighteen months of deliberations upon the Equal Pay Act, Congress carefully developed and explicitly indicated its intention that the federal courts not become involved in an employer's wage structure except to the limited extent of assuring that males

and females would be paid equally for performing the same work. The original bills would have permitted federal court involvement whenever men and women were performing "comparable work". However, Congress amended that legislation to limit federal involvement to the equal work situation in recognition of the same type of considerations discussed above regarding interference with the employers' prerogative to establish their own wage structures as long as men and women were paid the same when performing the same work.

Under the principles of in pari materia statutory construction and prior decisions of this Court, when a prior enactment (especially one dealing with a specific subject) reflects Congressional intent on a matter also covered by a later statute (especially a more general statute) -- it is presumed that the Congressional intent reflected in that prior enactment will control absent a specific statement in the later statute to the contrary. Radzanower v. Touche Ross & Co., 426 U.S. 148, 153 (1976); United States v. United Continental Tuna Corp., 425 U.S. 164, 169 (1976); Train

v Colorado Pub Int. Research Group, 426 U.S. 1 (1976).

There was no such statement in the enactment of Title VII which indicated that Congress intended to reverse its intention reflected in the Equal Pay Act of just one year prior.[4] Actually, whenever the subject arose it was indicated that the equal work standard would continue to be the applicable standard. Senator Clark, the floor manager of the bill, made that clear in his explanations months before Senator Bennett proposed his amendment to Section 703(h). When Senator Bennett proposed his amendment he indicated that its purpose was to preserve the "careful study" of the prior year so that "the provisions of the Equal Pay Act shall not be nullified."[5] Congressman Celler, sponsor of the bill in the House, explained in this regard how the Bennett Amendment provided that compliance with the Equal Pay Act would

4 The same Congress enacted both statutes.

5 See discussion infra at 53-54.

also satisfy Title VII, and on the basis of that explanation the House accepted the Bennett Amendment. However, the Court below did not consider the principles of in pari materia statutory construction. It also erroneously interpreted the language of the Bennett Amendment as intending to incorporate the four affirmative defenses found in the Equal Pay Act but not the core provision, the equal pay for equal work standard. The Ninth Circuit so ruled notwithstanding the fact that (a) there was no reference in the legislative history of Title VII to preserving the Equal Pay Act "affirmative defenses" while there was concern expressed for preserving the basic equal work standard and (b) the Ninth Circuit was apparently unaware that those affirmative defenses were already available under the provisions of Title VII as it existed before the Bennett Amendment was offered. The court below misread and erroneously relied upon a single unclear comment by Senator Dirksen in 1964 that was not even referring to the Equal Pay Act's affirmative defenses. In subsequent legislative history in 1965, Senator

Dirksen and Senator Bennett both explicitly indicated that the Bennett Amendment was intended to mean that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act. The Ninth Circuit held that it could not consider such comments, relying upon a misperception of this Court's decision in Galvan v. Press, 347 U.S. 522 (1954). In Galvan this Court in fact relied upon a 1951 memorandum by Senator McCarran in interpreting a 1950 statute which he sponsored. 347 U.S. 526-7.

Similarly, the administrative interpretation of the Bennett Amendment made contemporaneously with enactment of Title VII, by the Equal Employment Opportunity Commission, supports Petitioner's reading of the statute. In its 1965 guidelines and opinion letters the EEOC viewed the Bennett Amendment as incorporating the equal work standard, not merely the affirmative defenses. Those official interpretations made clear the EEOC's contemporaneous view that the Bennett Amendment "incorporate[d] the definition of discrimination

in compensation found in the Equal Pay Act."6/ the EEOC"s current view may be different. However, as this Court has previously emphasized in a virtually identical situtation, it is the agency's contemporaneous view that is entitled to deference. General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976). See also Udall v. Tallman, 380 U.S. 1 (1965). The General Electric decision, which was essentially ignored by the Ninth Circuit, also directly supports Petitioner's interpretation of the statute. In that case the Court interpreted the Bennett Amendment as incorporating the entire equal pay for equal work standard of the Equal Pay Act, after emphasizing how the legislative history of Title VII's prohibition of sex discrimination was notable for its brevity but that, through the Bennett Amendment, Congress had paid special attention to the provisions of the Equal Pay Act, 429 U.S. at 143-44. Thus Petitioner submits that Congress made a judgment that the federal courts were to be involved in sex-based wage rate claims only when it is alleged that discrimination exists between persons

6 See discussion infra at 79.

performing the same work, although the courts would be fully involved in assuring equal access to all jobs. Petitioner further submits that if that judgment is to be changed, it should only be done by Congress.

## ARGUMENT

### I. ADOPTION OF THE EQUAL WORK STANDARD IN THE EQUAL PAY ACT WAS THE PRODUCT OF EIGHTEEN MONTHS OF HEARINGS, COMMITTEE WORK, AND FLOOR DEBATE, AND INDICATED CONGRESSIONAL INTENT THAT FEDERAL COURTS NOT BECOME INVOLVED IN WAGE RATE CLAIMS OTHER THAN IN EQUAL WORK SITUATIONS

The Equal Pay Act was the first federal legislation dealing with discrimination in wage rates. As the product of eighteen months of Congressional deliberations on the subject, it is entitled to great weight in interpreting the meaning of the sex discrimination provisions of Title VII. This is particularly true since there was no discussion of the issue of sex discrimination in the hearings or committee reports on Title VII. Similarly, there was no discussion of the subject of discrimination in the setting of wage rates for jobs in the hearings or

committee reports on Title VII.[7]

The Equal Pay Act on the other hand, considered the entire spectrum of alleged sex discrimination in wage rates. The ramifications of federal involvement in this area then as well as now, were of great magnitude in regard to both the economic consequences of revision wage scales as well as the socio-political considerations of having the federal courts involved in the wage setting process.[8] The Court below took the

7 It is not surprising that wage rate discrimination was not discussed in the hearings and debates on Title VII because that problem was essentially a sex-related problem, as discussed infra at 19.

8 The economic consequences of discarding the limitations of the equal work standard are difficult to calculate precisely. It was estimated by Fortune Magazine in 1978 that: "to raise the aggregate pay of the country's 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering $150 billion a year to civilian payrolls." "The EEOC's Bold Foray Into Job Evaluation," Fortune, September 11, 1978, at 59. This estimate of such an increase in pay level is consistent with the 1977 (cont.)

(cont.)
difference in median wage levels of working men and women of $60,008. See U.S. Dept. of Labor, The Earnings Gap Between Men and Women (1979), at 6 (Table 1). Even if the increase in payroll costs were not a great as the above estimate, they would still be signficant. Of course, disregarding the equal work standard also has serious economic implications far beyond the increase in payroll costs. See, Lindsay, Equal Pay for Comparable Work: An Economic Analysis of a New Anti-discrimination Doctrine (1980), published by the Law and Economics Center of the University of Miami. Professor Lindsay cautions against the dangers of "[a]rbitrary manipulation of wage rates" and explains that governmental involvement in the wage area could result in "counterproductive effects," such as an overall loss of jobs. Id. at 33-34. Professor Lindsay concluded that "wage determination in different occupations is a complex, simultaneous process" and that "even in the absence of prejudice, and when performed under conditions of equal skill, effort, and responsibility, the real market value of dissimilar work can differ markedly." Id. at 3-4. A paper by George H. Hildebrand, Director of Cornell University's Center for the Study of American Political Economy, raises very similar concerns regarding the serious economic ramifications of abandonment of the equal work limitations and the ensuing governmental involvement in wage structures. Hidlebrand, "The Market System," in Comparable Worth: Issues and Alternatives, 105-6 (E.R. Livernash ed. 1980).

position that there should be a broad interpretation of the reach of Title VII in the wage area. In doing so it ignored the clear Congressional judgment reflected in the Equal Pay Act that there should be only limited federal involvement in an employer's wage rates. In fact, after much deliberation, Congress specifically amended the Equal Pay Act to preclude comparison in the wage rates of jobs which involve different work content. This Court has previously recognized the relevance of Congress' determinations in the Equal Pay Act to the interpretation of Title VII in the area of sex discrimination in wage rates.9/ Thus, the legislative history of the Equal Pay Act is a fitting subject with which to open our inquiry.

The problem of dealing with allegations of wage discrimination was fully presented by and explored by Congress in the course of the hearings and debates which led to the Equal Pay Act. That Act was the product of the 87th Congress and the first session of the 88th Congress. During the 87th Congress, Representatives

9 General Electric Co. v. Gilbert, 429 U.S. 125, 144 (1976).

Green and Zelenko introduced H.R. 8898 and H.R. 10226 respectively. These bills were identical and represented Administration proposals for equal pay legislation. Both bills stated in pertinent part:

> "Sec. 4. No employer ... shall discriminate ... between employees on the basis of sex by paying wages to any employee at a rate less than the rate by which he pays wages to any employee of the opposite sex for work of comparable character on jobs the performance of which requires comparable skills, except where such payment is made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." H.R. 8898, 87th Cong., 1st Sess; H.R. 10226, 87th Cong. 2d Sess. (emphasis supplied).

H.R. 8898 and H.R. 10226 were referred to the House Committee on Education and Labor, and the Select Subcommittee on Labor thereof held hearings regarding the bills in March and April 1962.10/ Thirty-nine individuals

10 Hearings on H.R. 8898 and H.R. 10226 before the Select Subcomm. on Labor of the House Comm. on Education and Labor, 87th Cong., 2d Sess. (1962) [hereinafter referred to as "1962 Hearings"].

testified before the subcommittee and statements, letters, etc., were received from many additional parties. In opening the hearings on this subject, Secretary of Labor Arthur Goldberg explained the breadth of this problem as he perceived it and emphasized that the proposed federal pay rate legislation was prompted by the existing situation of widespread deliberate discrimination against women in the setting of wage rates. 1962 Hearings at 11. Secretary Goldberg was followed by Assistant Secretary of Labor Esther Peterson who gave numerous examples of discrimination against women employees working in the same classification as males and also between males and females working in different classifications.11/

Among those who testified in support of H.R. 8898 and H.R. 10226 was James B.

11 1962 Hearings at 32-33. In fact, as part of her testimony, Ms. Peterson pointed to a recent study of the National Office Management Association wherein one-third of the employers had admitted to having dual pay standards for males and females. 1962 Hearings at 65.

Carey, the then President of the IUE, who stated that he believed the bills, as they then existed, were necessary to remedy the following situations of discrimination:

> "(1) Paying lower wages to women on the same jobs as men.
>
> "(2) Changing a man's job by modifying it slightly at a much lower rate of pay for women, a rate change not justified by the modification.
>
> "(3) Paying women lower wages irrespective of the value of the work performed. This occurs in situations where men and women work in different types of jobs in the same plant."12/

The above are examples from the hearings, which are replete with other presenta-

12 1962 Hearings at 173. Mr. Carey then put before Congress allegations of intentional discrimination by various employers (there employers in the electrical industry) who once had dual (male and female) wage structures which, in the IUE's view, had deliberately undervalued jobs performed by women. Mr. Carey contended that those employers' present rate structrues still reflected the vestiges of the former dual structure and, thus, in the IUE's view continued to deliberately undervalue the jobs performed by women. 1962 Hearings at 175-76.

tions by the Administration, advocates of women's causes, and the unions which urged broad federal involvement in the wage area to deal with the alleged problem of deliberate undervaluation of work performed by women.13/

After the wage discrimination bill14/ reached the House, Representa-

13 The standards reflected in the Equal Pay Act were developed against this background of claims of deliberate discrimination against women in the wage area. It would be absurd to contend that Congress believed it was dealing with a problem of inadvertent or unintentional discrimination against women when it adopted the standards of the Equal Pay Act. That is one reason why the suggestion in the opinion denying rehearing, by the court below -- that the presence of an allegation by a plaintiff that the wage discrimination was intentional (when added to a showing of comparable work) somehow makes the situation totally different and permits a court to disregard the equal work requirement -- is not a meaningful distinction. In adopting the equal work limitations of the Equal Pay Act, Congress was reacting to and dealing with a problem of alleged deliberate discrimination.

14 After the subcommittee hearings, H.R. 8898 and H.R. 10226 became H.R. 11677 which was reported out of the House Committee on Education and Labor (cont.)

tive St. George offered an amendment which limited involvement of the federal government to only situations where there was sex discrimination in setting of wage rates "for equal work on jobs, the performance of which requires equal skills." 108 Cong. Rec. 14767. Representative St. George offered the "equal work" amendment to limit wage discrimination claims to the situation where men and women are paid differently for performing the same job.

During debate of the St. George amendment, Mr. Zelenko explained that the "equal work" standard was narrower than his existing bill which allowed federal involvement whenever it was claimed that there was sex discrimination against women performing "comparable work" to that of males, and he urged that the bill

(cont.)
on May 17, 1962. On July 25, 1962, Representative Zelenko offered an amended version of H.R. 11677 to the House as a whole. 108 Cong. Rec. 14765. Section 4 of the bill still retained its provisions prohibiting sex discrimination in the wages of persons performing "work of comparable character on jobs the performance of which requires comparable skills."

retain the "equal pay for comparable work" language, as did the other sponsor of that bill, Representative Green. 108 Cong. Rec. 14768-69.

Representative St. George supported her amendment as follows:

> "What we want to do in this bill is to make it exactly what it says. It is called equal pay for equal work in some of the committee hearings. There is a great difference between the word 'comparable' and the word 'equal.
>
> ". . . The word 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes." 108 Cong. Rec. 14767.

Similarly, Representative Landrum noted that the St. George "equal work" amendment would prevent:

> "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States." 108 Cong. Rec. 14768.

The House accepted the St. George amendment[15/] changing the proposed

15 108 Cong. Rec. 14771.

equal pay legislation to provide for equal pay "for equal work on jobs the performance of which requires equal skills."16/ Thus, the House rejected the broad involvement of federal courts in an employer's wage structure that had been urged by the Administration and other supporters of the bill, such as the IUE.

Following other amendments, H.R. 11677 was passed by the House on July 25, 1962, and was subsequently referred to the Senate. The Senate passed its version of equal pay legislation, which also contained the St George amendment limiting the bill to "equal work" situations, but Congress adjourned before a Conference Committee could work out any difference between the two bills.

Early in 1963, in the first session of the 88th Congress, an equal pay bill similar to H.R. 11677, as amended by the St. George amendment, was introduced in the House. This bill was designated H.R.

16 See Section 4 of H.R. 11677 as amended.

3861.[17] Section 4 of H.R. 3861 contained the "equal work" requirement. 1963 Hearings at 3.

The Special Subcommittee on Labor held hearings regarding H.R. 3861 and other equal pay bills throughout March 1963. Twenty individuals testified on the proposed legislation and approximately ninety-five written statements on the legislation were received from various individuals, groups and businesses. Secretary of Labor Wirtz testified on behalf of the Administration and affirmed that the purpose of the equal pay bill was not to increase the wage levels of jobs, but simply to preclude sex discrimination in the setting of wages for equal work. 1963 Hearings at 65.

An equal pay bill was also proposed by Congressman Goodell in the form of an amendment to the Fair Labor Standards Act, 29 U.S.C. §201, et seq. This

17 Hearings on H.R. 3861 and Related Bills before the Special Subcomm. on Labor of the House Comm. on Education and Labor, 88th Cong., 1st Sess. 1 (1963) [hereinafter referred to as "1963 Hearings"].

proposal was designated H.R. 6060 and provided for equal pay for "equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions."[18] This was the standard for compensation claims eventually enacted by Congress. 29 U.S.C. §206(d).

The debate on H.R. 6060 is very instructive with respect to Congress' intent to prevent the courts and the government from analyzing and changing wage rates in all but the narrow equal work situation. For example, Representative Frelinghuysen stated in the House:

> "[W]e can expect that the administration of the equal pay concept, while fair and effective, will not be excessive nor excessively wide ranging. What we seek is to insure, where men and women are doing the same job under the same working conditions, that they will receive the same pay. It is not intended that either the Labor Department or individual employees will be equipped with hunting licenses." (emphasis added) 109 Cong. Rec. 9196.

18 See H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963).

Later in the debate, Representative Goodell (the sponsor of H.R. 6060)[19] stated:

> "Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> "We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear." 109 Cong. Rec. 9197.

19 Statements made by the sponsors of legislation "deserve to be accorded substantial weight in interpreting the statute." Federal Energy Administration v. Algonquin SNG, Inc., 426 U.S. 548, 564 (1976). Accord: Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 394 (1951); Gartner v. Soloner, 384 F2d 348, 353 (3d Cir. 1967), cert. denied, 390 U.S. 1040 (1968).

Representative Goodell stated that it was "not intended that the Secretary of Labor or the Courts will substitute their judgment for the judgment of the employers." 109 Cong. Rec. 9209. "It is not the business of the Secretary of Labor to write job evauation systems." Id.

Moreover, Representative Goodell rejected simplistic wage comparisons between men and women as the basis for relief:

> "We do not have in mind the Secretary of Labor's going into an establishment and saying, "Look you are paying the women here $1.75 and the men $2.10. Come on in here, Mr. Employer, and you prove that you are not discriminating on the basis of sex.' That would be just the opposite of what we are doing." 109 Cong. Rec. 9208.

Representative Frelinghuysen shared the sentiments of Representative Goodell:

> "[T]he jobs in dispute must be the same in work content, effort, skill and responsibility requirements, and in working conditions. As indicated earlier, it is not intended to compare unrelated jobs, or jobs that have been historically and normally considered to be different. Violations usually will be apparent, and will almost always occur in the same work area and

where the same tasks are performed." 109 Cong. Rec. 9196.

The legislative history thus indicates that the Courts were not to become involved in attempting to ascertain whether the differences in the duties between jobs were enough to justify the differences in wages between them. If the duties of the jobs were not substantially the same, then the courts were not to be involved in claims of discrimination in wage rates.[20] The House enacted the provisions of H.R. 6060 on May 23, 1963 and, after concurrence by the Senate, it became the Equal Pay Act of 1963.[21]

20 As an example, Representative Griffin noted that under H.R. 6060 the jobs of inspector and assembler could not be compared, nor could inspectors who inspect complicated parts be compared to inspectors making simple, cursory inspections. 109 Cong. Rec. 9197. Representative Thompson, one of the original sponsors of the equal pay legislation, agreed with Mr. Griffin's examples. 109 Cong. Rec. 9198.

21 To avoid the need for a House-Senate Conference Committee, the House vacated passage of H.R. 6060 and incorporated its provisions in their entirety into (cont.)

Thus during 1962 and 1963, Congress carefully considered the issue of sex-based compensation discrimination. The "equal pay for equal work" approach was the result of countless hours of hearings and debate. And throughout the entire consideration of the Equal Pay Act, it is plain that Congress did not want the government or the courts to determine wage rates. As the legislative history shows ". . . one reason for requiring equal work in order to invoke the Equal Pay Act was to preclude any massive job reevaluation by the Government in the Federal Court forum."22/ The equal work requirements, accordingly, have been viewed to be "laudable for that purpose, as the Federal Courts should not

(cont.)
S.1409, a similar bill that had been proposed in the Senate. The House then passed S.1409 and referred it to the Senate. On May 28 1963, the Senate concurred in the House amendment to S.1409. President Kennedy signed the Equal Pay Act on June 10, 1963, but it did not become effective until June 11, 1964.

22 IUE v. Westinghouse Electric Corp., ___ F.Supp. ___, 17 F.E.P. Cases 16, 21 (N.D. W.Va. 1977).

be involved in 'second guessing' economic decisions better left to management and labor."[23] Congress "did not authorize the Secretary or the Court to engage in wholesale reevaluation of an employer's pay structure in order to enforce their own conceptions of economic worth."[24]

We believe that it is extremely unlikely that the same Congress -- which, after eighteen months of hearings and debates, had decided in 1963 upon the extent of federal court involvement it desired in the area of sex-based wage rate claims -- intended to reject all of this work and to abandon the limitations of the equal work approach just one year later, when it enacted Title VII. As we now show, the principles of law concur with the principles of logic in this regard.

23 Id.

24 Brennan v. Prince William Hospital Corp., 503 F.2d 282, 285 (4th Cir. 1974), cert. denied, 420 U.S. 972 (1975).

## II. BY REASON OF THE PRINCIPLES OF IN PARI MATERIA CONSTRUCTION, THE EQUAL WORK REQUIREMENT WOULD BE APPLICABLE TO SEX-BASED WAGE RATE CLAIMS ASSERTED UNDER TITLE VII, EVEN ABSENT THE LANGUAGE OF THE BENNETT AMENDMENT

The Equal Pay Act and the sex discrimination provisions of Title VII are in pari materia and should be so construed in their interpretation.25/

The court below failed to consider the directly relevant legislative history of the Equal Pay Act, when interpreting Title VII. The legislative intent reflected in the Equal Pay Act, to limit federal court involvement to equal work situations, should be given controlling weight in the interpretation of Title VII, by reason of the principles of in pari materia statutory construction:

> "In terms of legislative intent, it is assumed that whenever the legislature enacts a

25 Numerous federal courts have held that Title VII and the Equal Pay Act are in pari materia. E.g., Orr v. Frank R. MacNeill & Son, Inc., 511 F.2d 166, 170 (5th Cir. 1975), cert. denied, 423 U.S. 865 (1975); DiSalvo v. Chamber of Commerce, 568 F.2d 593, 596 (8th Cir. 1978); Ammons v. Zia Co., 448 F.2d 117, 119 (10th Cir. 1971).

> provision it has in mind previous statutes relating to the same subject matter, wherefore it is held that in the absence of any express repeal or amendment therein, the new provision was enacted in accord with the legislative policy embodied in those prior statutes, and they all should be construed together." 2A C. Sands, Sutherland Statutory Construction §51.02 (4th ed. 1973) (footnotes omitted).

Although Title VII is more general in terms of the range of subject matters encompassed while the Equal Pay Act deals specifically with sex discrimination in wage rates, it is well-settled that general and specific acts are nonetheless to be construed in pari materia.[26] If there is any conflict, the specific statute will prevail, regardless of whether it was passed prior to the general statute, unless it appears that the legislature intended to make the general act controlling. This Court has

26 Radzanower v. Touche Ross & Co., 426 U.S. 148 (1946); United States v. United Continental Tuna Corp., 425 U.S. 164 (1976); Train v. Colorado Public Interest Research Group, 426 U.S. 1 (1976).

stated this canon of construction as follows:

> "It is a basic principle of statutory construction that a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum. 'Where there is no clear intention otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.' Morton v. Mancari, 417 U.S. 535, 550-551. [footnote omitted] The reason and philosophy of the rule is, that when the mind of the legislator has been turned to the details of a subject, and he has acted upon it, a subsequent statute in general terms, or treating the subject in a general mannr, and not expressly contradicting the original act, shall not be considered as intended to affect the more particular or positive previous provisions, unless it is absolutely necessary to give the latter act such a construction, in order that its words shall have any meaning at all.' T. Sedgwick, The Interpretation and Construction of Statutory and Constitutional Law 98 (2d ed. 1874). [footnote omitted]." Radzanower v. Touche Ross & Co., supra, 426 U.S. 148, 153

(1976).27/

Thus, where, as here, a statute has been drafted dealing with a specific area, the Congressional judgments as to the scope of regulation of that area would not be considered to have been set aside by a later enactment without a clear indication in the later enactment that Congress intended to do so. In United States v. United Continental Tuna Corp., 425 U.S. 164 (1976), the Ninth Circuit had held that an amendment to the Suits in Admiralty Act allowed plaintiffs to sue the United States under that Act and ignore the applicable and more

27 In Radzanower this Court was interpreting a broad general provision in the later act (which authorized suits to be filed against Securities Exchange Act defendants in a variety of jurisdictions). The Court held that the more restrictive specific provisions of an earlier act (the National Bank Act), which had focused more directly on the subject, would control the interpretation of the later more general provisions and suit could be brought against national banks under the Securities Exchange Act only where authorized under the earlier statute.

stringent provisions of the previously enacted Public Vessels Act. This Court rejected that construction of the Suits in Admiralty Act because it amounted to a repeal of the Public Vessels Act by implication without legislative history indicating that Congress intended that result. 425 U.S. at 169. The situation there was similar to the present one. This Court noted that the question was not whether the earlier statute would no longer have application to a particular set of facts, but whether the restrictive provisions thereof could somehow be evaded by bringing suit under another statute. 425 U.S. at 169. The Court recognized that such an evasion of the Congressional purpose reflected in the restrictive provisions would be largely equivalent to repeal of the more restrictive statute and would not be permitted absent some clear statement of intent by Congress that such was intended by the later statute. 425

U.S. at 169.[28]/

28 The court below failed to consider the principle of in pari materia construction in either of its decisions in this case. Interestingly, the Third Circuit, in its Westinghouse decision, acknowledged that the principles of in pari materia construction would suggest that the equal work standard was the applicable standard for sex-based wage rate claims brought under Title VII, citing Radzanower, supra. IUE v. Westinghouse, 23 F.E.P. Cases 588, 593 (3d Cir. 1980). Nevertheless, the Third Circuit decided to "decline to apply this canon," because the Third Circuit believed that the canon should not apply to employment discrimination cases. The Third Circuit mistakenly believed that Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974) had so held. However, Alexander did not involve the question of in pari materia construction of statutes. Alexander merely held that a plaintiff's decision to proceed in one forum (arbitration) did not bar him from later proceeding under Title VII. Alexander in no way indicated that the principles of in pari materia construction were inapplicable in ascertaining Congressional intent as to the meaning of the substantive provision of employment discrimination statutes. Of course, even if, assuming arguendo, Alexander had held the principles of in pari materia construction to be generally inapplicable (which it did not), such a holding would obviously not be relevant where, as here, Congress in the later statute specifically referred to the earlier statute (the Equal Pay Act) to assure that they would be construed in the same way.

Similarly, in Train v. Colorado Pub. Int. Research Group, 426 U.S. 1 (1976), this Court rejected a construction of the Federal Water Pollution Control Act which would have substantially altered the regulatory scheme established under the Atomic Energy Act, without a "clear indication of legislative intent." 426 U.S. at 24. Here, of course, the Equal Pay Act was a major piece of legislation in the wage area, and it should be presumed that the equal work standard of the Equal Pay Act continued to be the standard applicable to sex-based wage rate discrimination claims asserted under Title VII absent a clear statement of intent to the contrary in the legislative history of Title VII.

As we discuss infra at 42-78, the legislative history of Title VII does not constitute a clear statement of intent by Congress that it had changed its intention from that reflected in the Equal Pay Act it had passed just one year before. In fact, there is not a single statement in the legislative history of Title

VII which indicates an intention to abandon its decision of the prior year that federal involvement in wage discrimination claims would be limited to situations where men and women were performing equal work.

Actually, the legislative history of Title VII, as discussed infra, indicates that Congress, even prior to the Bennett Amendment, intended the prior, specific Equal Pay Act to be controlling.[29/] This merely buttresses the conclusion that the specific approach to sex-based wage discrimination in the Equal Pay Act would prevail over the general provisions of Title VII even in the absence of the Bennett Amendment.

Of course, although to be in pari materia, statutes need not have been enacted simultaneously or refer to

29 See the discussion of Senator Clark's memorandum infra at 46-49 explaining that Title VII should be construed in harmony with the Equal Pay Act for determining discrimination as to wages.

one another,30/ here the timing of the enactment of the Equal Pay Act and Title VII, along with the specific reference to the Equal Pay Act in the Bennett Amendment in §703(h) of Title VII, lend even further support to the County's position that these two statutes are in pari materia. For example, the Equal Pay Act became effective on June 11, 1964. The Bennett Amendment was inserted into Title VII one day later. In fact, even the composition of the Congress which enacted Title VII was the same as the Congress which enacted the Equal Pay Act.31/ Thus, it is clear that members of Congress, in enacting Title VII, were well aware of their very recent and extensive deliberations regarding the federal solution to alleged sex-based wage discrimina-

30 2A C. Sands, Sutherland Statutory Construction Sec. 51.03 (4th Ed. 1973).

31 The Equal Pay Act was adopted in the First Session of the 88th Congress; Title VII was adopted by the Second Session of the 88th Congress.

tion. As we shall now see, by inserting the Bennett Amendment into §703(h), Congress explicitly sought to ensure that its concept of the limited role of the federal courts in the review of wage rates, that had been developed in the Equal Pay Act, would not be undermined by Title VII. The 88th Congress obviously contemplated a restricted federal involvement in an employer's wage structure limited to assurance of equal pay for equal work, while at the same time assuring that there would be federal protection of equal access by women to any jobs they desired. Lemons v. City & County of Denver, 620 F.2d 228, 230 (10th Cir. 1980), cert. denied, 49 U.S.L.W. 3250 (Oct. 6, 1980). Accordingly, the principles of in pari materia statutory construction fully support the view that the Equal Pay Act's equal work standard applies to sex-based wage rate claims asserted under Title VII.

## III. THE LEGISLATIVE HISTORY OF TITLE VII INDICATES THAT CONGRESS INTENDED THAT THE "EQUAL PAY FOR EQUAL WORK" STANDARD WOULD BE APPLICABLE TO WAGE DISCRIMINATION CLAIMS UNDER THAT STATUTE AS WELL

### A. The Legislative History Of The Addition Of The Sex Discrimination Provision To Title VII Is Very Brief And Does Not Indicate An Intention To Abandon The Equal Pay Act's Approach To Wage Rate Discrimination.

The bill that was to become the Civil Rights Act of 1964 -- H.R. 7152 -- was proposed on June 20, 1963. That bill did not in any way refer to discrimination with respect to sex, either when proposed or during the several months it was considered by the House Judiciary Committee.32/ As proposed to and considered by the Committee, H.R. 7152 was legislation designed to prohibit employment discrimination only with respect to race, color, religion and national origin. H.R. 7152 was debated in the House from January 31, 1964 to February 10, 1964.

32 See H.R. Rep. No. 914, 88th Cong., 1st Sess. (1963).

Near the end of the debate, on February 8, 1964, Representative Smith of Virginia offered an amendment to add sex as a protected classification under H.R. 7152. The supporters of H.R. 7152 opposed the hastily introduced amendment, seeing it as a ploy by the opponents of the bill to overburden, weaken and defeat the legislation.[33/] Congresswoman Green, a supporter of H.R. 7152 (and a sponsor of an equal pay proposal in 1962), argued against the Smith amendment because the House Judiciary Committee had never considered -- indeed, had not even been asked to consider -- the advisability of including sex as a protected classification in the proposed legislation. 110 Cong. Rec. 2582. Congressman Celler, the sponsor of H.R. 7152, characterized the Smith amendment as "illogical, ill timed, ill placed and improper." 110 Cong. Rec. 2578.

The Smith amendment was accepted by the House on the same afternoon it was

33 See the remarks of Congresswoman Green at 110 Cong. Rec. 2581. Representative Smith, who proposed the amendment, voted against Title VII (H.R. 7152). 110 Cong. Rec. 15365.

proposed, without any hearings or committee deliberations, and with hardly any debate. Thus, at the time of adoption of the Smith "sex" amendment, the intent of Congress as to its general meaning and scope is unclear.34/ The legislative history of the Smith amendment is "notable primarily for its brevity." General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976). However, it is clear that there were no discussions in hearings, committee reports, or floor debates prior to the

34 The Fifth Circuit Court of Appeals en banc in Willingham v. Macon Telegraph Publishing Co., 507 F.2d 1084, 1090 (5th Cir. 1975) decided that the legislative history of Title VII's sex discrimination provisions was so "inconclusive" that it could be inferred that Congress did not intend the provisions to have "sweeping implications". Willingham held that the scanty legislative history of the Smith Amendment did not warrant the extension of the Title VII sex discrimination provisions to "situations of questionable application". Id. Obviously, involvement of the federal courts in wage rate claims in other than equal work situations is, at best, a "situation of questionable application" in light of Congress' rejection of such an approach in the Equal Pay Act the prior year.

Smith amendment which would have provided the basis for reconsideration by the Congress of its decision to adopt the equal work standard.

Moreover, while the reason the House added sex as a protected classificaton to H.R. 7152 is ambiguous (if not suspect), the subsequent legislative history of H.R. 7152 after it was passed by the House and referred to the Senate is clear with respect to the intended scope of the sex provisions in the compensation area. In the compensation area, the Senate paid "especial attention to the provisions of the Equal Pay Act." General Electric, supra, 429 U.S. at 143. As discussed below, the Senate determined that the Equal Pay Act standard would remain applicable under H.R. 7152 and the House later concurred.

H.R. 7152 went directly to the Senate Floor for debate upon its referral from the House. After three weeks of debate, Senator Clark, one of the floor managers for the bill, took the floor in support of passage of that bill. 110 Cong. Rec. 7208. Senator Clark had prepared various documents in response to objections to the bill which he believed to be un-

founded. The Senator submitted, inter alia, opinions from prominent lawyers, the Justice Department and the Labor Department stating that Title VII was constitutional, in reply to contrary contentions. He also presented a memorandum that responded to certain objections which had been raised in the form of questions by Senator Dirksen in a prior speech on the Senate floor, which questions Senator Clark felt his memorandum "answered rather convincingly." 100 Cong. Rec. 7215. Next, Senator Clark read into the record another memorandum he had prepared that answered certain other objectios which he noted had been raised both on and off the Senate floor and which he had selected for response. 110 Cong. Rec. 7217. One of these unfounded objections, selected for rebuttal in Senator Clark's memorandum, dealt with the compensation area. In response thereto Senator Clark clearly stated that Congress intended to continue the equal work standard under the Civil Rights bill:

> "Objection. The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963.

> But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitation in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except were there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII." 110 Cong. Rec. 7217 (1964) (emphasis added).

Senator Clark was explaining that the sponsors of Title VII construed the legislation in pari materia with the Equal Pay Act concerning wage discrimination claims. His comment was motivated by what he considered to be an unfounded objection. That objection was twofold: (1) that the sex discrimination provisions of Title VII were unnecessary since they duplicated the Equal Pay Act and (2) that, moreover, the sex discrimination

provisions of Title VII were improper since the equal work limitation was not specifically included in the language of Title VII and thus wage rate claims might be made concerning men and women "across different jobs." In response to that objection Senator Clark initially pointed out that the sex discrimination provisions of Title VII were necessary, notwithstanding the Equal Pay Act, because (a) the Equal Pay Act had numerous exemptions for various types of businesses and (b) Title VII covered discrimination in access (e.g., assignment and promotion) to jobs -- not just compensation. Finally, Senator Clark made clear that in the compensation area the equal work standard would continue to be the applicable standard.35/ Thus,

35 Senator Clark's position that the equal work standard would be deemed incorporated even absent specific language to that effect is in accord with well accepted principles of in pari materia statutory construction. See the discussion, supra, at 32-41. Senator Clark's explanation is entitled to great weight in view of his role as manager in charge of Title VII on the Senate Floor. Wright v. Vinton Branch of the (cont.)

Senator Clark rejected the unfounded objection that the sex provisions of Title VII were either unnecessary on one hand, or extended beyond the equal work standard on the other.

The court below, in denying rehearing, erroneously concluded that since the last sentence in the above quotation referred to the "comparable situation" Senator Clark must have meant that the Equal Pay Act standards are applicable only when a sex based wage discrimination claim is based on a theory that the plaintiffs were denied equal pay for equal work. (Pet App. 7a-8a). Not only is there no support for this interpretation, but this interpretation is totally implausible. The unfounded objection which Senator Clark had selected for rebuttal was that sex-based wage rate claims under Title VII might go beyond the equal work standard. Under the Ninth Circuit's interpretation, Senator Clark

(cont.)
Mountain Trust Bank, 300 U.S. 440, 463-64 and n. 8 (1937); Duplex Printing Press Co. v. Deering, 254 U.S. 443, 475 (1921); Ideal Farms, Inc. v. Benson, 288 F.2d 608, 616 (3d Cir. 1961), cert. denied, 372 U.S. 965 (1963).

was agreeing that Title VII wage rate claims could go beyond the equal work standard, i.e., whenever the plaintiffs alleged some other theory. Under the Ninth Circuit's interpretation Senator Clark was agreeing with the unfounded objection he had selected for rebuttal. That interpreation would be nonsensical. The logical reading of Senator Clark's statment reveals that the "comparable situation" to which he referred was wage discrimination generally as opposed to claims involving some other alleged employment practice, such as hiring or promotions. Senator Clark had made reference in the preceding sentence to such another type of unlawful practice, i.e., job segregation based on sex. In the last sentence he singled out "discrimination as to wages" and indicated that the standards of the Equal Pay Act would be applicable there. There is nothing in the passage to support the Ninth Circuit's conclusion that certain kinds of wage discrimination claims would be governed by standards other than the Equal Pay Act.36/

36 The Third Circuit majority opinion (cont.)

(cont.)
drew a somewhat different, but equally unlikely, conclusion i.e., that Senator Clark's memorandum was "not helpful as a gude to interpret the Bennett Amendment" since it predated the Bennett Amendment by two months. IUE v. Westinghouse, supra, 23 F.E.P. Cases at 594. This is obviously erroneous for a number of reasons. First, the Clark memorandum is relevant under principles of in pari materia construction to show the intention of Congress to preserve (rather than discard) the carefully adoped equal work standard, even absent the language of the Bennett Amendment. Second, because it shows the intentions of the Senate floor leadership on this matter even from the early part of the Senate debate, it provides a good context for understanding the later acceptance of the Bennett Amendment. The Third Circuit majority opinion is internally inconsistent on this matter. When discussing the Clark memorandum, it states that it is not helpful because it preceded the Bennett Amendment. But when discussing the Bennett Amendment, that court suggests that it should not be interpreted as limiting the scope of Title VII's wage discrimination provisions, as urged by the employer there, because it "would have been more widely disputed and discussed if that was the intent." 23 F.E.P. Cases at 596. But, the Bennett Amendment was not widely disputed because it implemented what had been the intention of Congress all along. Not only does the prior legislative history of the Equal Pay Act so demonstrate, but Senator Clark's memorandum does also.

Notwithstanding Senator Clark's earlier explanation, Senator Bennett remained concerned that, absent an explicit cross-reference to the Equal Pay Act, the "wholesale insertion" of the word "sex" in H.R. 7152 could nullify the carefully conceived Equal Pay Act standard. 110 Cong. Rec. 13647. Accordingly, he offered the following amendment to H.R. 7152:

> "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

Senator Bennett's amendment was designated a "technical correction" by the Senate leadership obviously since (1) the amendment confirmed the general intention of the Senate as evidenced by Senator Clark's earlier explanation of Title VII, and (2) the time for debate had been limited by the invocation of

cloture.[37] Senator Bennett's amendment was promptly agreed to by the Senate.

According to its terms, the Bennett Amendment clearly incorporates the "equal pay for equal work" standard of the Equal Pay Act into Title VII. Moreover, when the legislative history and purpose of the Bennett Amendment are considered, there is no doubt that it incorporates the Equal Pay Act's "equal work" standard into Title VII.[38]

In the limited time available when offering his amendment, Senator Bennett explained the purpose behind his amendment as follows:

> "Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after careful study by

37 Senator Bennett's statements, discussed in greater detail infra, confirm both of these points. 110 Cong. Rec. 13647 and 111 Cong. Rec. 13359.

38 The intent of Congress properly can be discerned by looking to legislative histories of the statutory provisions in question. E.g., Train v. Colorado Pub. Int. Research Group, Inc., 426 U.S. 1 (1976); United States v. American Trucking Associations, 310 U.S. 534 (1940); Cass v. United States, 417 U.S. 72 (1974).

> the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> "By this time, programs have been established for the effective administration of this act. Now when the civil rights bill is under consideration, in which the word 'sex' has been inserted in many places I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word 'sex' in the bill and in the Equal Pay Act.
>
> "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." (emphasis added) 110 Cong. Rec. 13647 (1964).

This passage clearly and concisely reflect the very principles of in pari materia statutory construction which are reflected in prior decisions of this Court and which have been discussed supra at 32 to 41. This passage demonstrates that the Bennett Amendment was intended to assure that the standards which had resulted from the "careful study" that produced the Equal Pay Act would continue under Title VII as the standards intended by Congress for treatment of sex-based wage discrimination claims. The key

standard reflected in the Equal Pay Act and the key decision reached by Congress in its "careful study", which produced the Equal Pay Act, was the equal work requirement.39/

39 The Third Circuit majority erroneously suggested (23 F.E.P. Cases at 595) that because the Senate had rejected certain other amendments which would have limited Title VII, the Senate would not have accpeted the Bennett Amendment if the purpose of that Amendment had been to limit Title VII sex-based wage claims in any way. There are several reasons why that suggestion is incorrect. First, during the same period in which the Bennett Amendment was considered and adopted by the Senate, various amendments which did significantly limit the scope or applicability of Title VII were introduced and adopted. Specifically, the Mansfield-Dirksen substitute amendment to H.R. 7152, introduced on June 10, 1964, added the first sentence to §703(h), containing explicit exceptions for employment practices based on a bona fide seniority or merit system, or on a system which measures earnings by quantity or quality of production. See 110 Cong. Rec. 13310 (1964). This first sentence of §703(h) has been established to have been a significant limitation upon the reach of Title VII. International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977). The Mansfield-Dirksen amendment, inter alia, (cont.)

(cont.)
also broadened the bona fide occupational qualification exception contained in §703(e); eliminated the EEOC's power to initiate an action in federal court; changed §706 to include stringent procedural prerequisites which must be satisfied before an aggrieved individual may bring suit in federal court; and added §703(j), which relieved an employer from the obligation of meeting any racial quota in the workforce. Also, on June 13, 1964, the Senate adopted the Tower Amendment (No. 952) to §703(h), which permits an employer to base personnel decisions on the results of ability tests. See 110 Cong. Rec. 13724 (1964). These other amendments, not considered by the Third Circuit majority opinion, demonstrate that at the time the Bennett Amendment was adopted, the Senate was making significant changes in the scope of Title VII, and that an interpretation of the Bennett Amendement as incorporating the "equal pay for equal work" standard into Title VII is entirely consistent with the other amendments adopted by the Senate at that time. Secondly, the Third Circuit ignored the fact that the Bennett Amendment did not reduce the scope of Title VII which had been intended by Congress. The Bennett Amendment merely reflected the desires of Congress from the start of the debate, as reflected in the Clark memorandum discussed supra, that the equal work standard be a prerequisite to sex-based wage rate claims.

In view of Senator Bennett's statment that "[t]he purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified," it must be recognized that the principal way that the Equal Pay Act can be nullified would be to allow plaintiffs unable to meet the "equal pay for equal work" standard to proceed under Title VII asserting some other theory of wage discrimination. Such a result would, for all practical purposes, constitute a repeal of the equal work standard of the Equal Pay Act by implication and would be directly contrary to prior decisions of this Court. E.g., Radzanower v. Touche Ross & Co., supra; United Continental Tuna Corp., supra; and Train v. Colorado Pub. Int. Research Group, Inc., supra. Congress' concern that the government and courts not become generally involved in the wage area would be cast aside.

After Senator Bennett's explanation of his Amendment, he asked the Senate leadership to indicate their acceptance of the amendment so that it could be voted on as a proper "technical correction", i.e., an amendment which would not

change the intention of the bill. Senator Humphrey succinctly agreed. Senator Dirksen took the occasion to give a short speech. It was on the basis of Senator Dirksen's short speech that both the Ninth Circuit and the Third Circuit concluded that in enacting Title VII Congress must have intended to go beyond the Equal Pay Act's standards. The following (110 Cong. Rec. 13647) is that dialogue:

> "Mr. BENNETT. I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand [sic], I shall ask that the amendment be voted on without asking for the yeas and nays.
>
> "Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
>
> "Mr. DIRKSEN. Mr. President, I yield myself 1 minute.
>
> We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor standards Act. The Fair Labor Standards Act carries out certain exceptions.

> All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
>
> Therefore, this amendment is necessary, in the interest of clarification.
>
> "The PRESIDING OFFICER. (Mr. RIBICOFF in the chair). The question is on agreeing to the amendment of the Senator from Utah. (Putting the question.)
>
> The amendment was agreed to."

The reasoning of the Ninth Circuit and the Third Circuit regarding this dialogue is very curious. Those courts concluded that -- because Senator Dirksen referred to how the Fair Labor Standards Act carried out certain exceptions and that the Bennett Amendment preserved those exceptions -- Senator Dirksen must have viewed the Bennett Amendment as not intending to preserve the basic core "equal work" standard of the Equal Pay Act, but only the exceptions of the Fair Labor Standards Act. The Ninth and Third Circuits viewed the word "exceptions" as referring to the affirmative defenses in the Equal Pay Act. Pet. App. 35a; 23 F.E.P. Cases at 595. However, Senator Dirksen's use of the word "exceptions"

came after his reference to the entire Fair Labor Standards Act, not merely the Equal Pay Act. This statement of Senator Dirksen is not as clear as his 1965 statements discussed infra at 62-63. The 1964 statement may well have been a reference to the exceptions then carried in the basic Fair Labor Standards Act for numerous types of enterprises (e.g., hospitals, nursing homes, schools, the fishing industry, etc.) and certain types of employees (e.g., executive, administrative, professional employees, etc.). Of course, the refusal of Congress in the Equal Pay Act to cover situations other than where "equal work" was involved might also have been considered as an exception by Senator Dirksen. But, the Ninth and Third Circuits incorrectly concluded that this unclear statement by Senator Dirksen must have been referring to the affirmative defenses in the Equal Pay Act even though he never used the phrase "affirmative defenses" and he referred to the "basic act" which is the Fair Labor Standards Act. Most likely Senator Dirksen presumed that there was not any dispute about the incorporation of the equal work standard as a require-

ment for assertion of sex discrimination claims under Title VII and he was focusing upon the Fair Labor Standards Act exceptions. It is unlikely that he would have been interested in preserving either the exceptions or the affirmative defenses but not the basic standard, i.e., the equal work standard. Of course, Senator Dirksen may even have been off on a tangent in his 1964 statement. But, in any event, that statement should not be given the "special significance" accorded by the Third Circuit. Moreover, it should be noted that Senator Humphrey had simply and directly indicated his concurrence with Senator Bennett's explanation.

Senator Bennett took further steps to ensure that the purpose of his amendment would be clearly understood when in 1965 he offered an amendment to the Senate's cloture rule to allow an additional five minutes for Senators to explain legislative amendments after the invocation of cloture. 111 Cong. Rec. 13359. Senator Bennett believed that additional time would be helpful for purposes of legislative history and he noted that after cloture had been invoked during the

debate of Title VII, the Senate leadership had urged him not to fully explain the Bennett Amendment since (1) the leadership understood and agreed with his intent to incorporate the Equal Pay Act standard into Title VII and (2) only a limited amount of time was available to complete work on Title VII. Id. Senator Bennett stated that even though it was well understood by the Senate that the Bennett Amendment was intended to mean "discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act," the restrictions of cloture had limited the Senator's ability to fully explain that intent. Id. Senator Dirksen, who was present in 1965 when Senator Bennett offered his amendment to the cloture rule, agreed with the comments of Senator Bennett. 111 Cong. Rec. 13360. Senator Dirksen stated that he and Senator Humphrey (another floor leader for the Civil Rights Act) and their staffs were in accord with Senator Bennett's understanding of the Bennett Amendment and that the Senator had accepted it on that basis. With respect to Senator Bennett's 1965 explanation of

the Bennett Amendment, Senator Dirksen further stated: "I trust that that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted."40/

The fact that Congress intended the test for determining wage discrimination under the Equal Pay Act to be the same for Title VII is further emphasized by the House of Representatives' understanding of the Bennett Amendment when that body agreed to that Amendment. After the Senate had amended H.R. 7152 and then

40 With respect to the 1965 statements by Senators Bennett and Dirksen, the supplemental opinion of the court below acknowledges that Senator Bennett's intention was to incorporate the Equal Pay Act's "equal work" standard into Title VII. But the Ninth Circuit (whose original opinion had lamented the sparseness of indications of Congressional intent) in rejecting rehearing held that Senator Bennett's statements of intent in 1965 were not binding on it because they were not made contemporaneously with the enactment of Title VII. (Pet. App. 4a-5a). The Ninth Circuit's basis for disregarding Senator Bennett's statements is unpersuasive. This Court's decision in Galvan v. Press, 347 U.S. 522 (1954) cited by the (cont.)

(cont.)
Ninth Circuit, actually supports the view that Senator Bennett's statements are entitled to great weight since he sponsored the Amendment. In Galvan, this Court relied upon a 1951 memorandum by Senator McCarran in interpreting the meaning of a 1950 statute he sponsored. 347 U.S. at 526-27. The Ninth Circuit's earlier opinion, Manhart v. City of Los Angeles Department of Power and Water, 553 F.2d 581 (9th Cir. 1976), aff'd in part and rev'd in part on other grounds, 435 U.S. 702 (1978), which had found unpersuasive certain comments regarding the Bennett Amendment made by Senator Humphrey after the Amendment's passage, carries little precedential value on this point since the Supreme Court in General Electric Co. v. Gilbert, 429 U.S. 125 (1976), analyzed those same comments without suggesting any infirmity because they were made after passage. The Ninth Circuit's opinion admits that this Court's decision in the Manhart case did not address the question of whether the Equal Pay Act's "equal work" standard applied to Title VII wage claims. (Pet. App. 12a). In addition to incorrectly interpreting Galvan, the Ninth Circuit failed to consider other authority of this Court which accords weight to non-contemporaneous legislative statements. E.g., Sioux Tribe v. United States, 316 U.S. 317, 329-30 (1942); Haynes v. United States, 390 U.S. 85 (1968). Finally, it should be noted that Senator Bennett's 1965 statement was made shortly after Title VII was enacted and would have been made contemporaneously with the enactment of the Bennett Amendment but for the invocation of cloture.

passed the amended bill that bill was returned to the House for deliberation on the Senate amendments. Congressman Celler, the original sponsor of H.R. 7152, provided the official and only explanation of the Bennett Amendment to the House membership prior to acceptance of the Senate amendments. He stated that the Bennett Amendment:

> "Provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex -- section 703(b) [sic] [703(h)]". (emphasis added) 110 Cong. Rec. 15896 (1964).

Congressman Celler's explanation clearly means that compliance with the Equal Pay Act[41/] satisfies the requirements of Title VII in the wage area. This explanation of the Bennett Amendment is entitled to great weight because (1) it was made by the sponsor of the legislation who obviously understood its provisions, including its amendments, and (2) the House passed H.R. 7152, including

41 The Equal Pay Act is contained in the Fair Labor Standards Act. 29 U.S.C. §206(d).

the Bennett Amendment, based on Congressman Celler's explanation.42/ After Congressman Celler's explanation of its provisions, the Civil Rights Act of 1964 was enacted by the House and, thus, became law.

The point that emerges from the legislative history of the Bennett Amendment is that while Title VII probably would have been construed in pari materia with the Equal Pay Act even

42 United States v. United Mine Workers, 330 U.S. 258, 279-80 (1947); Federal Energy Admin. v. Algonquin SNG, Inc., supra; Schwegmann Bros., supra. The Ninth Circuit incorrectly refused to give weight to Congressman Celler's comment, because that court believed that the comments of Senator Clark and Senator Bennett, discussed supra, were to the "contrary or inconclusive." First of all, the comments of Senators Clark and Bennett certainly are not contrary to those of Congressman Celler. Moreover, we do not believe that they are inconclusive either, for the reasons set forth supra. But, even if the comments of Senators Clark and Bennett were inconclusive, that would be no basis to disregard Congressman Celler's comment. The Third Circuit had a different theory for disregarding Congressman Celler's statement. The Third Circuit found that Congressman Celler's statement must have been (cont.)

without the Bennett Amendment,[43] the

(cont.)
implicitly referring only to situations where a plaintiff was alleging that different pay for equal work had occurred. IUE v. Westinghouse, 23 F.E.P. Cases at 595. The Third Circuit made this interpretation of the above quotation as follows. First, the Third Circuit correctly assumed that Congressman Celler obviously was not referring to satisfaction of all of the requirements of Title VII "since Title VII proscribes a broad range of gender-based discrimination which is not barred by the Equal Pay Act, such as discriminatory promotions, transfers and firing." Id. From this, the Third Circuit, without any substantiation, asserted that Congressman Celler must have been saying that compliance with the equal work standard constitutes compliance with Title VII only when a plaintiff is alleging a violation of the equal work standard. There is no warrant for that interpretation of Congressman Celler's statement. The very language of the Bennett Amendment applies to discrimination in "wages or compensation". There was no reason for Congressman Celler to repeat that phrase in his explanation since anyone reading the Bennett Amendment knew it applied to discrimination in "wages or compensation" not "promotions, transfers and firing". Congressman Celler's explanation obviously meant that compliance with the Bennett Amendment satisfied Title VII's sex discrimination provisions in the wage and compensation area.

43 See, the cases discussed supra at 32-41 and Senator Clark's memorandum quoted and discussed supra at 46-49.

Bennett Amendment was intended to make sure that the "equal pay for equal work" standard would continue to be the only standard for wage discrimination claims under Title VII.

B. The Language Of Section 703(h) Also Indicates That The Equal Pay Act's Equal Work Standard, Not Merely The Affirmative Defenses, Were Intended To Be Incorporated By The Bennett Amendment.

In its original decision, the court below did not have before it and did not consider much of the legislative history discussed supra.44/ Moreover, in its original decision, the Ninth Circuit had not placed much reliance upon the particular language of the Bennett Amendment, itself. In that original opinion the Ninth Circuit stated:

> "Two interpretations of the Bennett Amendment are plausible. The Bennett Amendment can be interpreted to incorporate the Equal Pay Act's equal work formula into Title VII. Under

44 The principal contention of the Plaintiffs in the court of appeals was that the district court had erred in finding that they had not met the equal work standard.

> this construction Title VII and the Equal Pay Act would be coextensive in the area of sexually discriminatory compensation and a plaintiff could prove a violation of Title VII only if discriminatory compensation also violated the Equal Pay Act. Alternatively, the Bennett Amendment can be construed as simply incorporating the Equal Pay Act's four affirmative defenses, but not its equal work standard, into Title VII's prohibition. We find the latter interpretation more persuasive." (Pet. App. 33a)

The Ninth Circut then noted that the legislative history was "sparse" but relied upon the statement by Senator Dirksen, discussed supra at 58 to 61, as the basis for holding the "latter interpretation more persuasive." (Pet. App. 33a). After the above legislative history regarding Senators Clark and Bennett and Congressman Celler was presented to the court by Petitioner and amicus Equal Employment Advisory Council, in conjunction with the petition for rehearing, the Ninth Circuit placed much less reliance upon legislative history as a basis for its decision. However, the court below, instead, placed great emphasis upon a revised view of the

meaning of the language of the Bennett Amendment. In the opinion denying rehearing, the Ninth Circuit stated that the language of the Bennett Amendment "almost compels the interpretation that the Bennett Amendment merely incorporates only the Equal Pay Act's defenses into Title VII." (Pet. App. 9a).

We submit that the language of the Bennett Amendment certainly does not "compel" the conclusion that it referred only to the Equal Pay Act's affirmative defenses. The Bennett Amendment explicitly refers to the entire Equal Pay Act (Section 6(d) of the Fair Labor Standards Act). There is no reference in the language of the Bennett Amendment to the affirmative defenses. This is, of course, consistent with Senator Bennett's stated concern that the "careful study" which resulted in the Equal Pay Act not be discarded. There was no suggestion by Senator Bennett that he was concerned only with preservation of the careful study which went into the Equal Pay Act's affirmative defenses, but not the basic core provision of the Act. When concern had previously been expressed regarding preservation of the standards of the

Equal Pay Act, that concern was expressed in regard to the equal work standard, not the affirmative defenses.45/

The Ninth Circuit, however, believed that the use of the word "authorized" was somehow a cryptic reference to only the affirmative defenses in the Equal Pay Act. That court believed that by using the word "authorized" Congress was drawing a fine distinction between something that was not illegal because it was not prohibited by the core equal work provision of the Equal Pay Act and something that was not illegal because it was within the affirmative defenses. The Third Circuit adopted a similar position when it stated that it viewed the word "authorized" as being "used to describe something that is endorsed or expressly permitted and not ... something which is merely not prohibited." IUE v. Westinghouse, supra, 23 F.E.P. Cases at 593. In support of this position the Third Circuit cited a definition of the word "authorized" in Webster's Third New International Dictionary. There are a

45 See the objection and response set forth in Senator Clark's memorandum, supra at 46-47.

number of reasons why the approach of the Third and Ninth Circuits was in error. First, neither court considered the facts, as noted supra, that (a) the Amendment explicitly referred to the entire Equal Pay Act, not merely the affirmative defenses, (b) Senator Bennett's comments did not suggest his concern was in any way limited to the affirmative defenses -- or even included the affirmative defenses, and (c) the concern expressed in Congress even before the Bennett Amendment was enacted in preserving the equal work standard, not the affirmative defenses. In interpreting the Bennett Amendment, we believe that the courts should attempt to implement that legislative intent rather than focusing upon dictionary definitions of the word "authorized."46/ However, even if dictionary definitions were to be our guide, the word "authorized" has been defined to mean exactly what the Ninth

46 Learned Hand suggested that in construing a clause in a statute one should not "make a fortress out of the dictionary," but rather should attempt to implement the legislative purpose. Cabell v. Markham, 148 F.2d 737, 739 (2d Cir. 1945), aff'd, 326 U.S. 404 (1945).

and Third Circuits said it could not. Black's Law Dictionary (4th ed 1968) at 169 defines "authorized" to mean "to permit a thing to be done in the future."47/

Moreover, when the sequence of the offering and passage of the Bennett Amendment are considered, it becomes even more certain that the Amendment was not aimed at preserving only the affirmative defenses of the Equal Pay Act and that the Ninth and Third Circuit's focus upon debatable dictionary definitions of the word "authorized" do not well serve Congressional intent.48/

At the time Senator Bennett offered his amendment, the first sentence of §703(h) already provided that it was not an unlawful employment practice under Title VII to pay a wage differential:

47 See the discussion of this point by Judge Van Dusen in IUE v. Westinghouse, supra, 23 F.E.P. Cases at 601.

48 The four affirmative defenses of the Equal Pay Act cover payments "made pursuant to (i) a seniority system (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex . . ." 29 U.S.C. §206(d).

> ". . . pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex, or national origin."

Thus, three of the four Equal Pay Act affirmative defenses, i.e., a "seniority system," a "merit system," and a "system which measures earnings by quantity or quality of production" had already been specified in the first sentence of §703(h). The fourth Equal Pay Act affirmative defense, i.e., a payment based on "any other factor other than sex" hardly needed to be added to Title VII since Title VII would not apply to sex situations in the first place unless the employer was discriminationg "becuase of ... sex."49/ Thus, if the Ninth Circuit's interpretation of the Bennett Amendment were correct, the Bennett Amendment would be construed as making no addition to the meaning of Title VII. The last sentence of §703(h) would be

49 The Ninth Circuit had been unaware, at the time of its original decision, (cont.)

meaningless.

However, "It is an elementary rule of construction that effect must be given, if possible, to every word, clause and sentence of a statute. A statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant. . .(citation omitted)" 2A C. Sands, Sutherland Statutory Construc-

(cont.)
that the language of Title VII already contained all of the affirmative defenses before the Bennett Amendment was added. That court, in denying rehearing, contended that even if the three other affirmative defenses had been noted in the first sentence of Section 703(h), the Bennett Amendment was most significantly intended to incorporate the "any other factor other than sex" defense of the Equal Pay Act. (Pet. App. 11a) This suggestion is demonstrably illogical on the face of the Bennett Amendment, itself, without even reference to the language of §703(a). If the Ninth Circuit's view were reflected in the statutory language, the Bennett Amendment would then be interpreted to read as follows: It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of wages or compensation ... if such differentiation is based on any other factor other than sex. That interpretation would make nonsense out of the Bennett Amendment.

tion §46.06 (4th ed. 1973).50/ The Ninth Circuit's interpretation of the Bennett Amendment, which essentially renders it superfluous and insignificant, flies in the face of this fundamental rule of statutory construction.

This Court, however, has previously recognized that the Bennett Amendment did have meaning and significance. This Court explained that it was the intent of Congress, as reflected in the Bennett Amendment, to preserve and incorporate the equal pay for equal work standard -- not merely the affirmative defenses -- of the Equal Pay Act.

In General Electric Co. v. Gilbert, 429 U.S. 125, 144 (1976), this Court held

50 This basic principle that the courts are to construe a statute so as to give effect, if possible, to every clause and every word thereof is reflected in even the early cases. Montclair v. Ramsdell, 107 U.S. 147, 152 (1883). That principle continues to be applicable. See F.A.A. v. Robertson, 422 U.S. 255, 261 (1975) (it is "axiomatic that all parts of an Act 'if at all possible, are to be given effect,'"); Weinberger v. Hynson, Wescott & Dunning, Inc., 412 U.S. 609, 633 (1973); Mercantile National Bank v. Langdeau, 371 U.S. 555, 560 (1963); United States v. Menasche, 348 U.S. 528, 538-39 (1955).

that the Bennett Amendment made interpretations of the Equal Pay Act's core "equal pay for equal work" provision applicable to Title VII. The plaintiffs there were urging that the exclusion of maternity from benefit plans was sexually discriminatory under Title VII. In rejecting those arguments, the Court stated:

> "The legislative history of Title VII's prohibition of sex discrimination is notable primarily for its brevity. Even so, however, Congress paid especial attention to the provisions of the Equal Pay Act, 29 U.S.C. §206(d) [at which point this Court quoted in a footnote that entire act, including the equal work standard, not merely the affirmative defenses], when it amended §703(h) of Title VII by adding [the Bennett Amendment]." 429 U.S. at 143.

The Court then stated that: "Because of this [Bennett] amendment, interpretations of §6(d) of the Equal Pay Act are applicable to Title VII as well ..." 429 U.S. at 144. At that point the Court quoted and relied upon an interpretation of the core "equal pay for equal work" provision of the Equal Pay Act, not one

of the affirmative defenses.51/

In summary regarding the legislative history of Title VII, the Ninth Circuit's interpretation of the Bennett Amendment not only would render the last sentence of §703(h) meaningless, but would also be inconsistent with clear Congressional intent to preserve the approach taken, after "careful study", in the Equal Pay Act.

51 The Ninth Circuit essentially ignored this portion of the General Electric opinion. The Third Circuit's only response was an erroneous synopsis of that case. The Third Circuit stated: "With the Bennett Amendment the Equal Pay Act exceptions became 'applicable to Title VII as well.' General Electric v. Gilbert, 429 U.S. at 144 (Equal Pay Act provisions on pregnancy benefits are controlling)." 23 F.E.P. Cases at 593. As the complete quotation from General Electric set forth above makes clear, the Court did not refer only to "exceptions" or to "affirmative defenses." It referred to the entire Equal Pay Act and relied upon a regulation interpreting the "equal pay for equal work" standard. 29 C.F.R. §800.116(d) (1975).

## IV. THE EEOC'S CONTEMPORANEOUS INTERPRETATION OF THE BENNETT AMENDMENT REFLECTS THE CONGRESSIONAL INTENT TO INCORPORATE THE EQUAL WORK STANDARD INTO TITLE VII AS THE STANDARD OF PROOF APPLICABLE TO SEX-BASED COMPENSATION DISCRIMINATION CLAIMS UNDER TITLE VII

Further support for Petitioner's position is found in the EEOC's official interpretations of the Bennett Amendment which were issued shortly after the passage of the statute in the form of an official regulation as well as official opinion letters. These contemporaneous agency interpretations are entitled to considerable weight as they were issued by the administrators of the statute when the intent of Congress was fresh in their minds. Udall v. Tallman, 380 U.S. 1, 16 (1965); General Electric Co. v. Gilbert, supra, 429 U.S. at 142. The EEOC's contemporaneous interpretations of the Bennett Amendment clearly state that the Equal Pay Act's equal work standard is incorporated into title VII as the standard which must be met by plaintiffs alleging sex-based compensation discrimination claims under Title VII. Their interpretations clearly reject the position taken by the Ninth Circuit that

the use of the word "authorized" in the Bennett Amendment was intended to incorporate the Equal Pay Act's affirmative defenses, but not the equal work requirement. To the extent that the EEOC's current position concerning the Bennett Amendment conflicts with these more contemporaneous interpretations, the earlier interpretations should be accorded the greater deference by this Court. Udall v. Tallman, supra; General Electric, supra.

Shortly after Title VII was enacted, the EEOC issued official "Guidelines on Discrimination Because of Sex," which initially appeared in 30 Federal Register 14927 (Dec. 2, 1965). One of the official 1965 guidelines specifically interpreted the Bennett Amendment as follows:

> "(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. §206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in

> the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act." (emphasis supplied).52/

Shortly after the EEOC issued its guideline interpreting the Bennett Amendment, the Commission's General Counsel explained the guideline in an official opinion letter. EEOC General Counsel Duncan opined on December 29, 1965 (the same month that 29 C.F.R. §1604.7 was promulgated) as follows:

> "The Commission, as indicated in section 1604.7 of the Guidelines issued November 24, 1965, 30 F.R. 14928, has decided that Section 703(h), Title VII of the Civil Rights Act of 1964 incorporates the definition of discrimination in compensation found in the Equal Pay Act, including the four enumerated exceptions, but that

52 This interpretation was codified as 29 C.F.R. §1604.7 (1966).

> Section 703(h) was not intended to recognize for purposes of Title VII the various exemptions to the coverage of the Fair Labor Standards Act found elsewhere in that statute. Therefore, where a charge of discrimination in compensation on grounds of sex involves an employee covered by both the Fair Labor Standards Act and Title VII, the Wage-Hour Administrator and this Commission have concurrent jurisdiction, but where the employee is exempted from the Fair Labor Standards Act but covered by Title VII, this Commission is the appropriate enforcement agency." App. B.

EEOC General Counsel Duncan's opinion as to the EEOC's official interpretation of the Bennett Amendment leaves no room for doubt; he quite clearly stated that the Bennett Amendment had incorporated "the definition of discrimination in compensation found in the Equal Pay Act", i.e., the equal work standard, as well as the "four enumerated exceptions," i.e., the Equal Pay Act's four affirmative defenses. The EEOC General Counsel also made clear that the third sentence of 29 C.F.R. §1604.7(a) was merely intended to clarify the employee coverage provision of Title VII.53/

53. General Counsel Duncan's official (cont.)

(cont.)
explanation of the 1965 guideline shows the error in the interpretations of the guideline by the Ninth Circuit below and the Third Circuit panel majority in IUE v. Westinghouse, supra. In the instant case the Ninth Circuit, referring only to the first sentence of §1604.7(a), erroneously contended that the EEOC's 1965 guideline caused the equal work standard to apply under Title VII only when a Title VII plaintiff was asserting an equal pay for equal work claim. (Pet. App. 38a). However, §1604.7(a), as well as General Counsel Duncan's official explanation, in no way limit the incorporation of the equal work standard in the manner suggested by the Ninth Circuit. Neither the Bennett Amendment, §1604.7(a), nor General Counsel's official explanation of §1604.7(a) state that the equal work standard was incorporated into Title VII only when a plaintiff believed she could meet that standard. Rather, the above opinion letter states that by virtue of the Bennett Amendment the definition of sex-based wage discrimination contained in the Equal Pay Act became the definition for sex-based wage discrimination under Title VII. The Ninth Circuit failed to even discuss the key second sentence of §1604.7(a). The Third Circuit's view of 29 C.F.R. §1604.7(a) wa also erroneous. The Third Circuit panel suggested, referring to the third sentence of §1604.7(a), that the EEOC viewed Title VII as having a broader standard of sex-based wage discrimination than the equal work standard. However, it is clear from both §1604.7(a) and General Counsel Duncan's
(cont.)

On March 1, 1966, General Counsel Duncan issued an opinion letter responding to an inquiry as to whether it would violate Title VII to pay women employees more than men employees because of a minimum wage law applicable only to women. App. C. General Counsel Duncan opined that the minimum wage law would not provide a justification for violating Title VII prohibitions, but he made clear that the Title VII prohibition concerning sex-based compensation discrimination would only apply if the women employees had received lower wages than men for performing equal work:

> "The Commission takes the position that the existence of a state or local minimum wage law applicable to employees of only one sex is not a justification for differences in compensation

(cont.)
December 29, 1965 opinion letter that the third sentence of §1604.7(a) only referred to the differences in employee coverage of the two statutes (i.e., where particular types of employees, such as executive, administrative or professional employees were covered under Title VII although not under the Fair Labor Standards Act), not to the standard applicable for adjudicating sex-based wage discrimination.

> based on sex which would otherwise be unlawful under Title VII. Accordingly, where an employer pays a certain wage to employees of one sex in order to comply with such a law, he must also pay the same rate to employees of the opposite sex for equal work." (emphasis added). App. C.

EEOC General Counsel Duncan issued another opinion letter on May 19, 1966, responding to a somewhat similar fact situation posed by the Special Assistant to the Solicitor of the United States Department of Labor concerning compliance with Title VII in states having minimum wage laws applying only to women. EEOC General Counsel Duncan was again of the opinion that a Title VII violation concerning sex-based compensation discrimination could only occur if men and women were performing the same work for different pay. In expressing that official opinion, EEOC General Counsel relied upon and explained the EEOC's official guideline, 29 C.F.R. §1604.7, as follows:

> "It follows that an employer covered by Title VII may not pay a male less than the California minimum wage while paying the statutory rate to a woman for the

same job. Furthermore, we take the position that he may not refuse to hire a woman for a job because state law would require him to pay her more than he is presently paying males. 29 C.F.R. 1604.1(c)(2). On the other hand, it must be conceded that so long as no woman is in fact employed in a given job category, it is not unlawful for an employer to pay male workers less than he would have to pay a woman if she were employed, for we read the Equal Pay Act and the Administrator's interpretation thereunder to forbid actual and not hypothetical differentials, and, whatever the general rule may be under Title VII, the Bennett Amendment compels us to apply the same test for differences in compensation based on sex, 29 C.F.R. 1604.7." App. D.

On July 23, 1966, EEOC Commissioner Samuel C. Jackson issued an official opinion addressing an inquiry as to whether a seven cent pay differential between male and female employees would violate Title VII. Commissioner Jackson responded as follows, quoted in pertinent part (reproduced from BNA Daily Labor Reports No. 171, pages A-3 to A-4 (September 1, 1966)):

"Your letter of July 7, 1966, requested an opinion on whether Title VII of the Civil

> Rights Act of 1964 is violated by a rate for female laborers seven cents per hour below the rate for male laborers.
>
> "Assuming that male and female laborers perform the same functions (as the job classifications tend to indicate), a wage differential would violate the Act [Title VII]. Maintenance of the two job classifications based on sex would in itself be a violation unless there is a functional difference in the two job categories." (emphasis added) App. E.

Like the above-quoted opinion letters of the EEOC General Counsel, EEOC Commissioner Jackson made it quite clear that a wage differential between a job performed by women and one performed by men would not violate Title VII unless the men and women were performing equal work.

On June 6, 1967, EEOC Acting General Counsel Holbert issued an opinion to the Director of the Commission's Albuquerque, New Mexico office explaining the meaning of the Bennett Amendment, including the EEOC's interpretation of the wage differentiations "authorized" by the Bennett Amendment. Acting General Counsel Holbert made clear that

the Equal Pay Act's equal work standard (i.e., equal skill, effort, responsibility, and working conditions), as well as the Equal Pay Act's affirmative defenses (i.e., seniority systems, merit systems, etc.) were incorporated by the phrase "authorized" in the Bennett Amendment. That opinion states:

> "Differentiations which are authorized under said Section [703(h)] are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.
>
> "It is the interpretation of those provisions that requires harmonization between Title VII and the Equal Pay Act amendment to the FLSA, because these are the provisions which, within the meaning of Section 706(h) [703(h)], 'authorize' differentiations," (emphasis added). (App. F)

Thus, starting in 1965, shortly after Title VII was enacted and the EEOC was organized and staffed, and continuing at least until mid-1967, the Commission's official interpretation of

the Bennett Amendment was that it incorporated the Equal Pay Act's equal work standard as the standard for proving sex-based compensation discrimination claims under Title VII.54/

Sometime after mid-1967 the EEOC apparently began to change its position and, on April 5, 1972, issued revised guidelines on sex discrimination. The 1972 guideline is very unclear in regard to the matter at issue here.55/ The

54 The opinions discussed supra show that the Ninth Circuit in this case (Pet. App. 9a) and the Third Circuit in IUE v. Westinghouse, supra, 23 F.E.P. Cases at 593, erred in interpreting the word "authorized" in the Bennett Amendment as incorporating only the Equal Pay Act's affirmative defenses into Title VII, but not the Equal Pay Act's equal work standard. The opinions are reprinted as appendices in the form obtained from the EEOC. These opinions were obtained from the EEOC's files after the decision of the Third Circuit, which accepted the representation made at the oral argument therein, by the EEOC's General Counsel appearing as amicus, to the effect that the EEOC had never interpreted the Bennett Amendment as adopting the equal work requirement.

55 Unlike the 1965 guideline, the 1972 guideline, set forth at App. A, does not discuss the standards necessary to prove sex-based compensation claims. 29 (cont.)

1972 guideline does not mention the equal work standard or any other standard of proof regarding sex-based compensation claims.[56/] But in any event, the EEOC now apparently takes the position that the Bennett Amendment incorporates only the affirmative defenses but not the equal work stan-

(cont.)
C.F.R. §1604.8. That 1972 guideline does state that: "By virtue of section 703(h) a defense based on the Equal Pay Act may be raised in a proceeding under Title VII." The guideline notes that even in considering such a defense, the EEOC would not consider itself bound by the Department of Labor's interpretation of the Equal Pay Act. The 1972 guideline, in paragraph (a), retains a similar provision to that in the 1965 guideline which stated that employees not covered by the Fair Labor Standards Act would nevertheless be covered employees if they fell within Title VII's employee coverage.

56 Actually, according to the EEOC's own regulations, only views expressed in prior Commission pronouncements which were "inconsistent" with the 1972 guidelines were intended to be overruled by the 1972 guidelines. 29 C.F.R. §1604.1(b). Since the 1972 guideline does not mention any standard of proof for sex-based compensation claims, it might not be viewed as overruling the 1965 guideline, which does state that the "standards of 'equal pay for equal work'" were the standards applicable to Title VII.

dard.57/ However, the EEOC's current views in no way reduce the weight which should be given to the EEOC interpretation which was contemporaneous with enactment of Title VII and which supports the County, as discussed supra.

The situation of the EEOC later taking a position in conflict with its official contemporaneous interpretation of Title VII is similar to situations presented to this Court in the General Electric case. In General Electric, supra, the EEOC's General Counsel Duncan stated in a 1966 opinion letter that the exclusion of pregnancy related disabilities from a salary continuation program did not violate Title VII. In 1972, the EEOC issued revised guidelines stating that the exclusion of pregnancy related disabilities from salary continuation programs did violate Title VII.58/ This Court gave deference to

57 The EEOC took that position in the briefs and oral argument it submitted in the Third Circuit in IUE v. Westinghouse.

58 These were part of the same revised sex discrimination guidelines which contained the reference to raising defenses based on the Equal Pay Act which was discussed supra at n. 55.

the 1966 opinion issued by the General Counsel, and held that the EEOC's 1972 guideline did not "fare well" under the Court's longstanding approach to according deference to agency determinations because (1) "[i]t is not a contemporaneous interpretation of Title VII, since it was first promulgated eight years after the enactment of that Title" and (2) "[m]ore importantly, the 1972 guideline flatly contradicts the position which the agency had enunciated at an earlier date, closer to the enactment of the governing statute." 429 U.S. at 142. As in General Electric, the current position of the EEOC does not "fare well" when compared with prior 1965 guidelines and the opinions discussed supra, which were issued in 1965, 1966, and 1967. First, the current EEOC interpretation of the Bennett Amendment is not a contemporaneous interpretation of Title VII. Second, the EEOC's current position that the Bennett Amendment incorporated only the affirmative defenses, not the equal work standard, "flatly contradicts" the 1965 guidelines and the opinion letters discussed above. The 1965 guidelines

and the above-quoted opinions explicitly support the view that the Bennett Amendment was intended to adopt the equal work standard and not merely the affirmative defenses of the Equal Pay Act. They make clear that §703(h) "incorporates the definition of discrimination in compensation found in the Equal Pay Act." General Counsel's Opinion letter dated December 29, 1965.

These contemporaneous interpretations, issued as they were shortly after Title VII was enacted, no doubt were based upon and reflect the Congressional intent and legislative history relating to Title VII and the Equal Pay Act, which was discussed in the preceding sections of this Brief. Such a contemporaneous interpretation is more likely to reflect the desire of Congress than interpretations issued several years after enactment of the statute. General Electric, supra; Udall v. Tallman, supra.

Even absent the 1965 regulation and the 1965-1967 opinions, which support the County, the EEOC's present view of the Bennett Amendment would not be entitled to deference for the separate

reason that application of that interpretation would be "inconsistent with an obvious Congressional intent not to reach the employment practice in question. Courts need not defer to an administrative construction of a statute where there are 'compelling indications that it is wrong.' [citations omitted]." Espinoza v. Farah Mfg. Co., 414 U.S. 86, 94-95 (1973). Accord: Morton v. Ruiz, 415 U.S. 199, 237 (1974).

## V. FIVE OF THE SIX OTHER CIRCUITS THAT HAVE CONSIDERED THIS ISSUE ARE IN ACCORD WITH THE POSITION URGED BY PETITIONER

In Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971), the plaintiff claimed she was denied a higher level of compensation because of her sex (due to the discriminatory refusal of a security clearance to enter a restricted area of the plant). 448 F.2d at 118. Regarding the compensation claim, Ammons held that "to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work." 448 F.2d at 120 (emphasis added). It had been earlier noted in Ammons that Title VII

was to be construed in pari materia with the Equal Pay Act and that both statutes served the "same fundamental purpose." 448 F.2d at 119. Accordingly, the Tenth Circuit analyzed plaintiff's compensation claim against the equal work standard and held that plaintiff had not sustained "her burden of showing that she was paid less than others performing 'substantially equal work,'" 448 F.2d at 120. In Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir. 1980), cert. denied, 49 U.S.L.W. 3250 (October 6, 1980), the Tenth Circuit recently held that the plaintiffs (nurses) could not establish a claim of sex discrimination in wages because they could not show a differential in pay based on sex for performing equal work. The Tenth Circuit refused to venture into "the whole new world" of wage claims not meeting the equal work standard, relying upon (1) Congress' rejection of the "comparable work approach" in the Equal Pay Act in favor of the equal work standard, and (2) the Bennett Amendment, as well as the Congressional intent concerning that Amendment. 620 F.2d at 229-30.

In Orr v. MacNeill & Son, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975), a Title VII case claiming intentional sex discrimination in setting of wage rates, the Fifth Circuit set forth the following principles: (1) Title VII must be construed in harmony with the Equal Pay Act [citing, inter alia, the Equal Pay Act, Ammons, and the language of §703(h)]; (2) "To establish a case under Title VII it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation" (citing Ammons); and (3) finally the Fifth Circuit quoted a passage from one of its prior decisions under the Equal Pay Act which holds that for a wage claim to be established, the job content of the jobs in questions must be "virtually identical." Since the plaintiff in Orr had admitted that her job was different than jobs performed by men, the Fifth Circuit held that she was not entitled to relief under Title VII as a matter of law. 511 F.2d at 171. Calage v. University of Tennessee, 544 F.2d 297 (6th Cir. 1976), affirmed the district court's applica-

tion of the "equal work" standard by reason of the Bennett Amendment [400 F. Supp. 32, 37-39 (E.D. Tenn. 1975)] and cited Orr with approval, although the Sixth Circuit noted that plaintiff was not contesting that legal standard on appeal.

The Fourth Circuit has recently reaffirmed its position that Title VII sex-based wage rate claims must meet the equal work standard. In Stastny v. Southern Bell Telephone & Telegraph Co., 628 F.2d 267, 281, (4th Cir. 1980), the district court had found the employer liable under Title VII for wage discrimination based on comparisons of average female earnings and average male earnings within broad salary classifications. Id. However, since female plaintiffs did not show that their actual jobs were substantially equal to jobs performed by men, involving equal skill, effort, responsibility and similar working conditions, the Fourth Circuit reversed the finding of liability, holding that plaintiffs' wage claims suffered from a "total failure of proof," relying upon the Bennett Amendment, as well as Orr, Ammons, and

on earlier decision of the Fourth Circuit. The Eighth Circuit also has held, contrary to the Ninth and Third Circuits, that the doctrine of in pari materia statutory construction applies and that the provisions of Title VII regarding sex discrimination in the area of compensation must be construed in harmony with the Equal Pay Act. DiSalvo v. Chamber of Commerce, 568 F.2d 593, 596 (8th Cir. 1978), citing Ammons, supra, and Orr, supra.

Thus, most of the Circuits which have considered the issue have found that the Equal Pay Act's "equal work" standard is the applicable standard which must be met by plaintiffs asserting sex-based wage rate claims under Title VII.59/

## VI. THE LEGAL RULE OF LIMITING WAGE DISCRIMINATION CLAIMS TO SITUATIONS INVOLVING "EQUAL WORK", WHILE PROVIDING EQUAL ACCESS TO ALL JOBS, IS SUPPORTED BY SOUND POLICY CONSIDERATIONS.

Not only the statutory language, legislative history, principles of

59 There are numerous district court decisions under Title VII which have

statutory construction, contemporaneous administrative regulations and opinions, and the majority of the circuit decisions in point reject Respondents' approach. Sound policy considerations also militate against the Ninth Circuit's interpretation.

Respondents have contended that the difference in pay between their job and the Corrections Officer job was not commensurate with the relative difficulty of the two jobs but that, rather, was explicable by the sex of the incumbents. Without delineating the standards to be followed the Ninth Circuit has remanded for the purpose of such an analysis. Under this approach the pay structure of virtually every employer

(cont.)
similarly limited the scope of federal court adjudications to equal work situations. E.g., Kohne v. IMCO Container Co., 480 F. Supp. 1015 (W.D. Va. 1979); Chrapliwy v. Uniroyal, Inc., 458 F. Supp. 252 (N.D. Ind. 1977); Cullari v. East-West Gateway Coordinating Council, 457 F. Supp. 335 (E.D. Mo. 1978); Chapman v. Pacific Tel. & Tel. Co., 456 F. Supp. 65 (N.D. Cal. 1978); United States v. City of Milwaukee, 441 F. Supp. 1371 (E.D. Wis. 1977); Molthan v. Temple University, 442 F. Supp. 448 (E.D. Pa. 1977).

and the entire economy would be at risk and subject to scrutiny by the federal courts. There are countless jobs predominantly performed by women which are not high paying.60/ Any woman who holds a job predominantly performed by women and who is dissatisifed with her wage rate could file a Title VII suit claiming sex-discrimination, cause the federal court to analyze the difficulty of her job compared to the difficulty of whatever higher paying jobs performed by a man or men that plaintiff selects, and request that the federal court adjust plaintiffs' wage rate to a higher level, although not necessarily as high as that of the comparison job. Obviously men could also file such suits. Presumably whenever the employer (or the Court)

60 E.g., women represent 97.8% of all Registered Nurses, 94.5% of elementary school teachers, 69% of retail sales clerks, 76.6% of all clerical workers (including bank tellers, bookkeepers, file clerks, secretaries, etc.), 96% of seamstresses, 98% of child care workers, 96% of maids, 82.9% of food servers (waitresses), and 87.6% of all health service workers. See 1975 Handbook on Women Workers, U.S. Department of Labor, Bulletin 297 (1975) at 89-91.

would set new wage rates, new claims could be filed by other groups of employees whose rate relationship has been altered and the process would start all over again.

But Respondents' particular claim is just the tip of the iceberg. For Respondents to be able to assert their claim, the equal work limitation has to be read out of Title VII. If that limitation would not apply, Title VII plaintiffs could draw any type of comparison imaginable concerning job duties and pay between any job predominantly performed by women and any job predominantly performed by men. Until the decision below, the federal courts without exception had been rejecting claims of sex discrimination in setting wage rates which did not meet the equal work standard.[61] Absent

61 See, e.g., Keyes v. Lenoir Rhyne College, 552 F.2d 579 (4th Cir.), cert. denied, 434 U.S. 904 (1977) (claim based on a statistical comparison of male and female faculty members); Calage v. University of Tennessee, 400 F. Supp. 32 (E.D. Tenn. 1975), aff'd, 544 F.2d 297 (6th Cir. 1976) (claim based on a salary comparison of a job held by a woman and a job held by a man at the same level on (cont.)

the equal work limitation a torrent of litigation is likely to fill the courts. Such claims will envelop the federal judiciary in virtually unsolvable problems. Is the wage differential between the female receptionist and the male sales manager justified, or was the sex of the occupants somehow a factor? Should nurses have been paid as much as accountants and other professionals or was their work undervalued because it is a female occupation? Should the nurses have been paid more than accountants? Accountants deal with numbers, nurses with lives? All of these questions and problems, plus many more, will flood the federal system if the equal work requirement is eliminated from Title VII.

The federal courts would have to become job evaluation tribunals. Eventually, if not immediately, the

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the University's organization chart); Lemons v. City & County of Denver, 620 F.2f 228 (10th Cir. 1980), cert. denied, 49 U.S.L.W. 3250 (Oct. 6, 1980) (claim that nurses should be paid the same as accountants and buyers and that the market system itself discriminates against females).

federal courts would become a prime regulator (if not the prime regulator) of many wage rate relationships between different types of jobs, for the simple reason that there still are strong sexual preferences for different types of jobs.62/ If the equal work limitation is removed, after wage relationships between jobs have been set by collective bargaining, or by whatever means, disgruntled groups of employees (male or female) or the union could then seek still higher pay from the federal

62 A recent study of occupation preference sponsored by the United States Department of Labor concluded that women have entered lower paying occupations as a matter of their own preference (shaped before they even enter the job market) and not by reason of employment discrimination. Years for Decision, Vol. 4 (1978), U.S. Dept. of Labor, Employment Training Administration. As a result of the study the Director of Research and the Employment Training Administrations's office of Research and Development concluded that: "Despite affirmative action programs and publicity on the career success of women in stereotypical male positions, most women have not changed their career aspirations. They continue to plan careers in traditionally female positions. As a result, they continue to occupy lower paying positions. Id. at iii.

judiciary. Women could voluntarily elect not to move to a higher paying job (e.g., one involving poor working conditions, physical effort, or some other aspect they do not like) but still seek the high pay level of that job.

Quite obviously, however, the federal courts are not equipped to deal with such questions of job evaluation, nor, as set forth supra, did Congress ever intend the courts to even try to adjudicate such claims.63/

The social and political sensitivity of the federal government setting an employer's wage rates is repeatly reflected in the legislative history set forth in prior sections of this Brief. It is at least as important a question today as it was in the 1960's. The limited involvement permitted by the

63 To say the least, the trial judges who have been asked to adjudicate Title VII sex-based wage claims which have not met the equal work standard have been, with good reason, decidedly unenthusiastic about becoming involved with such complex, and in many cases esoteric, questions. See e.g., Lemons v. City and County of Denver, 17 F.E.P. Cases 906, 910-911 (D. Colo. 1978); Kohne v. Imco Container Co., 480 F. Supp. 1015, 1039 (W.D. Va. 1979).

Equal Pay Act and the Bennett Amendment does not create such problems since the federal courts are not really determining the wage rate that is appropriate for any job, but merely assuring that all persons doing the same job get the same wage rate. However, if the equal work standard is abandoned, the courts will be determining what wage level is appropriate for particular jobs. For example, the Matron job here was found by the Ninth Circuit to not be substantially equal to the Corrections Officer job and thus, legitimately could be paid less -- but the trial court would have to determine how much less.

In addition, various economists have predicted that federal court involvement in an employer's wage structure under a comparable work approach, or some other approach which goes beyond the equal work standard, will have serious economic consequences.64/

64 Although it is difficult to fully quantify these effects, it appears likely that they will include the counterproductive effects of: (a) raising wage levels for some jobs above their rate of marginal revenue product, (cont.)

Within state and local governments the economic consequences merge with political ones. Local government budgets are heavily oriented toward employee wages and benefits.65/ At the same time, the total dollars available to provide services sought by the public are limited and there is no profit factor that can be adjusted as a source of additional funds. Consequently, any external force that increases labor costs to local governments is likely to result in a reduction of the services that can be provided. Women in

(cont.)
(2) causing at least some unemployment of women in those occupations where the wage level is increased, (3) removing the incentive for movement by women to jobs traditionally held by males, and (4) creating a disequilibrium in the allocation of jobs in that wages for an occupation would be raised at the same time that the quantity of labor demanded is lowered. Lindsay, Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine (1980), at 33-34; Hildebrand, "The Market System" in Comparable Worth: Issues and Alternatives (E.R. Livernash ed. 1980), at 102-06.

65 David T. Stanley, in his Brookings Institution study entitled, Managing
(cont.)

the governmental job market will experience the same counterproductive effects felt in the private sector. But in addition, difficult political decisions will have to be made between public services retained and those abandoned as a direct result of wage adjustments brought about by federal involvement.

Because of the serious social, political, and economic considerations involved, many of which have not yet been fully studied, we believe that Respondents' request that the judiciary

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Local Governments Under Union Pressure (1974), has noted (p. 19):

> "[A]ccording to a variety of analysis, one-half to three-fourths of local government expenditures go to wages and benefits. 'It is well to remember,' says one analyst, 'that more than seventy percent of the operating budget of a typical local government is for personnel.' Another reminds us that personnel costs account for about three-fifths of New York's expense budget. The exact portion of the budget varies according to how capital costs and operating expenses are categorized, but employees clearly receive a major share of the money spent by cities and counties."

became involved in situations outside the equal work approach is really a request for a piece of social legislation.

In the early 1960's Congress formed a judgment that the role of the federal judiciary in the setting of wage rates would be a limited one, although the role of the judiciary in assuring equal access to all jobs would be extensive. We believe that that judgment was correct. Most of the barriers to access to jobs have been removed or are in the process of being removed. Presumably there eventually will be a reduced need for federal intervention to guarantee that access.

On the other hand, if the federal judiciary is drawn into the function of comparing the value of different jobs and the setting of wage rates, they may never withdraw from that function. Federal setting of wage rates for different jobs or adjudicating the wage differential that would be permissible between two different jobs strikes to the very heart of the type of nation which will exist in future years.

Thus, we believe that Congress in 1963 and 1964 made the correct decisions to provide extensive federal involvement to assure access to all jobs but only a limited role in the setting of wage rates. But, even if Congress was wrong in the decisions it made in 1963 and 1964, we believe it is the function of that body to decide whether to now involve the federal judiciary in the setting of wage structures.

## CONCLUSION

For all of the foregoing reasons, Petitioner respectfully requests that the opinions and order entered by the United States Court of Appeals for the Ninth Circuit in this matter be reversed.

Respectfully submitted,

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# APPENDIX

## APPENDIX A

## STATUTES AND REGULATIONS INVOLVED

1. SECTION 703(A) OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42 U.S.C. §2000E-2(A) (1976):

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin or;

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. SECTION 703(H) OF THE CIVIL RIGHTS ACT OF 1964, AS AMENDED, 42

U.S.C. §2000E-2(H) (1976):

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations, provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to

employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

3. EQUAL PAY ACT OF 1963, 29 U.S.C. §206(d)(1) (1976):

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any

employee.

4. EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. §1604.7 (1965), ORIGINALLY PUBLISHED IN 30 FED. REG. 14928 (DEC. 2, 1965):

Relationship of Title VII to the Equal Pay Act

(a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by

section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) Accordingly the Commission will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator, Wage and Hour Division, Department of Labor. These interpretations are found in 29 Code of Federal Regulations, Part 800.119-800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administrator before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

5. EEOC GUIDELINES ON DISCRIMINATION BECAUSE OF SEX, 29 C.F.R. §1604.8 (1979), ORIGINALLY PUBLISHED IN 37 FED. REG. 6836 (APRIL 5, 1972):

Relationship of Title VII to the Equal Pay Act

(a) The employee coverage of the prohibitions against discrimina-

tion based on sex contained in title VII is coextensive with that of the other prohibitions contained in title VII and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.

(b) By virtue of section 703(h), a defense based on the Equal Pay Act may be raised in a proceeding under title VII.

(c) Where such a defense is raised, the Commission will give appropriate consideration to the interpretations of the Administrator, Wage and Hour Division, Department of Labor, but will not be bound thereby.

## APPENDIX B

December 29, 1965
[GC-665-65]

W. R. McCabe and Associates
1416 Westwood Boulevard, Suite 7
Los Angeles, California 90024

Attention: Mr. Sidney R. Catsiff

Dear Mr. Catsiff:

This is in reply to your letter of December 13, 1965, in which you ask who is the enforcement agency for those employees who may have complaints concerning pay discrimination, but who are exempt from coverage under the Fair Labor Standards Act.

The Commission, as indicated in section 1604.7 of the Guidelines issued November 24, 1965, 30 F.R. 14928, has decided that Section 703(h), Title VII of the Civil Rights Act of 1964 incorporates the definition of discrimination in compensation found in the Equal Pay Act, including the four enumerated exceptions, but that Section 703(h) was not intended to recognize for purposes of Title VII the various exemptions to the coverage of the Fair Labor Standards Act found elsewhere in that statute.

Therefore, where a charge of discrimination in compensation on grounds of sex involves an employee covered by both the Fair Labor Standards Act and Title VII, the Wage-Hour Administrator and this Commission have concurrent jurisdiction, but where the employee is exempted from the Fair Labor Standards Act but covered by Title VII, this Commission is the appropriate enforcement agency.

Sincerely yours,

SMBach/RKBerg:aee:12/23/65

Charles T. Duncan
General Counsel

cc: Chron
Subject
EXSEC (2)

APPENDIX C

March 1, 1966
[GC-227-66]

[Addressee name deleted by EEOC]

Your letter of February 21, 1966 to the President's Committee on Equal Employment Opportunity has been referred to this Commission for reply. You state that you are presently paying your male and female workers $1.25 an hour. You state further that the District of Columbia minimum wage for women workers has been raised to $1.40 an hour. You ask whether it will be unlawful discrimination under Title VII of the Civil Rights Act of 1964 if you pay your women workers $1.40 an hour pursuant to the District of Columbia regulation, while you continue to pay your male workers $1.25 an hour.

The Commission takes the position that the existence of a state or local minimum wage law applicable to employees of only one sex is not a justification for differences in compensation based on sex which would otherwise be unlawful

under Title VII. Accordingly, where an employer pays a certain wage to employees of one sex in order to comply with such a law, he must also pay the same rate to employees of the opposite sex for equal work. The position taken by the Commission on this question is consistent with the position already taken by the Wage-Hour Administrator under the Equal Pay Act of 1963, 29 C.F.R. 800.161.

Sincerly yours,

Charles T. Duncan
General Counsel

RKBerg:cbe 2/28/66

cc: Chron; Subject; Charles Donahue, Solicitor of Labor

## APPENDIX D

Mr. Henry Rose
Special Assistant to the Solicitor
Department of Labor
Washington, D.C.

Dear Mr. Rose:

In your memorandum of January 21, 1966, you pose the following problem:

The California minimum wage law prescribes a minimum wage of $1.30 an hour for women, but not for men. You state that the California State Employment Service may not refer women to jobs which pay less than $1.30 an hour, nor may it refer individuals to employers who pay employees of one sex less than employees of the other sex when both are performing equal work. (We assume that this is a matter of State policy and not a requirement the Employment Service infers from Title VII.) In this situation is it a violation of Title VII for the California Employment Service to refer only men to jobs paying less than $1.30 an hour?

The Wage-Hour Administrator has taken the position that where a State minimum wage for women is higher than

the Federal minimum wage, the employer paying the higher wage to women must pay the higher rate to male employees doing equal work in order to comply with the Equal Pay Act. 29 C.F.R. 800.161 The Equal Employment Opportunity Commission likewise takes the position that under Title VII the necessity to comply with a State minimum wage law applicable to only one sex does not justify a differential in compensation on account of sex.

It follows that an employer covered by Title VII may not pay a male less than the California minimum wage while paying a statutory rate to a woman for the same job. Furthermore, we take the position that he may not refuse to hire a woman for a job because state law would require him to pay her more than he is presently paying males, 29 C.F.R. 1604.1(c)(2). On the other hand, it must be conceded that so long as no woman is in fact employed in a given job category, it is not unlawful for an employer to pay male workers less than he would have to pay a woman if she were employed, for we read the Equal Pay Act and the Administrator's interpretations

thereunder to forbid actual and not hypothetical differentials, and, whatever the general rule may be under Title VII, the Bennett Amendment compels us to apply the same test for differences in compensation based on sex. 29 C.F.R. 1604.7.

It appears to us clear, therefore, that the California State Employment Service may not refer only men to jobs which pay less than $1.30 an hour where the employer is covered by Title VII. (We assume for purposes of this discussion that the jobs are not those for which sex is a bona fide occupational qualification.) Although the offered wage is less than $1.30, the conjunction of Title VII and State law forces the employer both to hire a qualified woman applicant and to pay her the State minimum. Therefore, the Employment Service may and should assume that the employer will comply with his legal duties. Furthermore, if he does not, the onus will be on him, whereas under its present course of action the Employment Service is apparently insulating employers against liability for discriminatory practices, and this is the

very evil that Congress sought to correct by preventing discriminatory referrals by employment agencies. We recognize that the present policy of the Employment Service is motivated by the legitimate desire to avoid exposing women workers to the likelihood of exploitation at substandard wages; but to the extent that this State policy conflicts with the non-discrimination requirements of Title VII it must yield. Furthermore, the Employment Service is not left without avenues to enforce its policy, for Title VII leaves it an option. It may either refuse all referrals to jobs paying less than $1.30, or it may refer men and women without discrimination. Furthermore, if it chooses the latter course, it may inform the employers of the requirements of State law and Title VII, and, perhaps, inform the agency which enforces the minimum wage law of the possibility of future violation by the employer.

Where the employer is not covered by Title VII we have a more difficult case. Generally, the Commission takes the position that the prohibition of section 703(b) is applicable to all

referrals, etc., by an employment agency and is not limited to the agency's dealings with covered employers. This construction is not only consistent with a literal interpretation of the statute, but has a policy justification as well. For even where an employer not covered by Title VII places a discriminatory job order, he may, when confronted by a qualified applicant, be persuaded that his basis for discrimination was unfounded. However, where an employer not covered by Title VII proposes to pay substandard wages, it is difficult to see what purpose would be served by requiring that women applicants be referred to him, and we believe that in this circumstance the State policy against referral of women workers should be permitted to prevail. Accordingly, we would not regard it as a violation of Title VII for the California State Employment Service to refer only men to jobs paying less than $1.30 an hour where the employer is not covered by Title VII.

Sincerely yours,

Charles T. Duncan
General Counsel

RKBerg:aee:5/4/66

APPENDIX E

July 23, 1966

Your letter of July 7, 1966, requested an opinion on whether Title VII of the Civil Rights Act of 1964 is violated by a rate for female laborers seven cents per hour below the rate for male laborers.

Assuming that male and female laborers perform the same functions (as the job classifications tend to indicate), a wage differential would violate the Act. Maintenance of the two job classifications based on sex would in itself be a violation unless there is a functional difference in the two job categories.

While a discriminatory wage rate is a continuing violation, a charging party would not be entitled to back pay for any period earlier than ninety days prior to the filing of the charge. In addition, the wage differential in question may violate the Equal Pay provisions of the Fair Labor Standards Act. If it does so, a complaining party may be entitled to back pay for up to

two years.

Enclosed is a form for a charge which you may wish to file with this Commission. Also, I suggest that you write to Mr. Clarence T. Lundquist, Administrator, Wage and Hour Division, Department of Labor, Washington, D.C. concerning the equal pay aspects of your complaint.

Should you have any further questions, please do not hesitate to contact the Commission.

Sincerly yours,

Samuel C. Jackson
Commissioner

Enclosure

[Reproduced from BNA Daily Labor Reports, No. 171, pages A-3 to A-4 (Sept. 1, 1966)]

APPENDIX F

UNITED STATES GOVERNMENT
EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

MEMORANDUM

DATE: Jun. 6, 1967
In reply refer to:

TO:
Tom E. Robles
Director, Albuquerque RO

FROM:
Kenneth F. Holbert
Acting General Counsel

SUBJECT:
Applicability of Section 800.108 of Administrators Interpretative Bulletin on Equal Pay for Equal Work, Part 800 to Proceedings under Title VII of the Civil Rights Act of 1964 in Light of the Commission Guidelines on Sex Discrimination, Part 1604 Commission Procedural Regulations, Section 1604.7

The following question has been raised before your office: A privately-owned public utility operating within your region has multiple offices. A charge of discrimination has been filed by a female employee operating in one office building in a large city. The basis of the charge is that she is paid less for performing similar work to that performed by male employees

because of her sex. The male employees with whom she is being compared are employed in a separate building which is located approximately two miles away from the site of the employment of the Charging Party. Under the above-cited Interpretative Bulletin of the Administrator, Wage and Hour Division, as explained in the Administrative Opinion of the Administrator of June 17, 1966, (BNA, FEP 401:-739), and as applied by the Administrator in similar situations, the male employees are located in a separate establishment from the female employee within the meaning of the Equal Pay provision of the Fair Labor Standards Act. Therefore, no comparison of the wages of said male and female employees may be made for the purposes of determining a violation of the Equal Pay provisions of the FLSA.

You raise the question whether the concept of "establishment" and related administrative interpretations and opinions under the Equal Pay provisions of the FLSA constitute "relevant interpretations" within the meaning of Section 1604.7 of the Procedural Regulations of the Commission, so that the

commission is bound by said opinions and interpretations.

It is concluded that Section 800.108 of the Interpretative Bulletin of the Administrator and opinions issued thereunder do not constitute "relevant interpretations" within the meaning of the Commission Procedural Regulations cited above, and that in processing cases alleging discrimination in pay based on sex, the Commission is not restricted to a comparison of rates in the same "establishment" of a multi-establishment employer.

The "relevant interpretations" of the Equal Pay Act to which the Commission regulations speak are those dealing with the measurement process in determining whether there is equal pay for equal work, within the area in which the FLSA and the provisions of Title VII overlap. This means that in situations to which [both] statutes are applicable, the same standards and rules shall be applied to determine whether there is "equal pay for equal work". However, as Section 1604.7 of our Procedural Regulations suggests, the regulation was not intended to restrict the coverage of

Title VII to those situations where the FLSA is not applicable. The Equal Pay provisions of the FLSA are applicable only within the limits of an establishment as that term is used in the statute, and as it has been interpreted. The concept of an "establishment" is foreign to Title VII. Title VII contains no such limitation unless it is found in Section 703(h) which provides:

> It shall not be unlawful employment practice under this Title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid to employees of such employer if such differentiation is authorized by the provisions of Section 6(d) of the FLSA of 1938 as amended.

Differentiations which are authorized under said Section are differentiations on the basis of skill, effort, responsibility and working conditions, and differentiations related to a seniority system, a merit system, a system which measures earnings by quantity or quality of production or a differential based on any other factor than sex.

It is the interpretation of these

provisions that requires harmonization between Title VII and the Equal Pay amendment to the FLSA, because these are the provisions which, within the meaning of Section 706(h) [703(h)], "authorize" differentiations. The Equal Pay amendment does not authorize sex discrimination between employees in different establishments, within the meaning of Section 703(h).

It simply does not deal with such discrimination. No affirmative Congressional intent to authorize discrimination on the basis of sex between employees in different establishments may be read into Section 703(h), or into Section 1604.7 of the Procedural Regulations of the Commission. Accordingly, the concept of "establishment" and its interpretations and limitations are not applicable to proceedings under Title VII.

No. 80-429

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT
OF APPEALS FOR THE NINTH CIRCUIT

# BRIEF FOR RESPONDENTS

CAROL A. HEWITT
RICK T. HASELTON
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700 Columbia Square
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Attorney for Respondents

## QUESTION PRESENTED FOR REVIEW

Are claims of intentional gender-based wage discrimination, which do not meet the equal work standard of the Equal Pay Act, 29 U.S.C. § 206(d), actionable under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1 to 2000e-17?

## PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding in the United States Court of Appeals for the Ninth Circuit are listed in the caption to this brief.

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No. 80-429

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

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THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

Petitioners,

v.

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,

Respondents.

---

# BRIEF FOR RESPONDENTS

## STATEMENT OF THE CASE

Respondents Alberta Gunther, Velene Vallence, Marion Vander Zanden and Yvonne Hatton were jail matrons employed by Washington County, Oregon.

As matrons, their principal responsibilities were to process and guard female prisoners. On occasion, respondents transported prisoners, assisted in arrests, and processed records. They also performed duties relating to male inmates, including booking them in, taking mug shots, and fingerprinting.

Respondents' male counterparts in the jail performed essentially the same functions as matrons, but only with respect to male prisoners. Until June 1973, respondents' male counterparts were deputy sheriff recruits who were assigned to the jail on a temporary rotating basis. Deputies were paid between $668 and $853 per month, and recruits received monthly salaries ranging from $636 to $736, while the respondents were paid from $476 to $606 per month for their work. (Dist.

Ct. Opinion at 4.) This unequal compensation of matrons and male corrections officers was contrary to the practice in other counties in the Portland metropolitan area where male and female corrections personnel received equal wages.

Beginning in June 1973, deputies and recruits were phased out of jail duties and replaced by "corrections officers," a newly created position. The official job descriptions for matron and corrections officer were identical and incumbents were required to take the same civil service exam and complete the same classroom training.

On January 1, 1974, the salary range for matrons was $525 to $668 per month, and the salary range for corrections officer was $701 to $896 per month. Six months after respondents were terminated, corrections officers with at least two

years of experience became senior corrections officers at a salary range of $812 to $1,036 per month. The average experience of the matrons at the time of their termination was 4.3 years. (Def. Ex. 1.)

In the spring and summer of 1973, the respondent matrons unsuccessfully pressed requests for equal pay with the County and the Washington County Police Officers Association, the bargaining unit for county jail employees. Sheriff Barnes had long believed that the matrons were undercompensated and had, in 1972, recommended a substantial wage increase which would have brought the matrons almost to parity with male corrections personnel. The Civil Service Commission rejected this unilateral request because salary levels were to be fixed through collective bargaining between the County and

the Police Officers Association. When the matrons requested the union, which had only eight female members, to negotiate for higher pay, union officials told them to "cool it." (Gunther Depo. at 20; Hatton Depo. at 6-7.)

A few months after the matrons requested equal pay, Washington County closed the women's jail, boarded out its female prisoners in an adjoining county's facilities, and terminated the respondent matrons' jobs. Two other matrons, who had not sought equal pay, were transferred to other positions with the jails. At the time of respondents' discharge, the defendant sheriff completed personnel forms on which he stated that he would not rehire them. The respondents' subsequent efforts to secure reemployment with the County were unsuccessful.

The respondents then filed this action under Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e-1--2000e-17 (1976), and the Equal Pay Act, 29 U.S.C. § 206(d)(1) (1976). They alleged, generally, that the defendant County and officers had denied them equal pay for substantially equal work, that even if their work was not the substantial equivalent of that performed by the deputy sheriffs and corrections officers, some element of the disparity in compensation was solely attributable to discrimination on the basis of sex, and that the defendants had terminated and refused to rehire them in retaliation for their equal pay requests.

The district court, after severely restricting presentation of evidence supporting plaintiffs' claims, entered judgment for the defendants.

The court found that the matrons' work was not substantially equal to that performed by deputies and corrections officers and concluded that this resolution of the equal pay issue precluded further consideration of the alternative discriminatory compensation claim. The trial court also rejected respondents' retaliatory discharge claims.

The Court of Appeals for the Ninth Circuit affirmed the district court's disposition of the equal work and retaliatory discharge questions as not clearly erroneous. The court held, however, that the Equal Pay Act's equal work standard did not govern respondents' Title VII claim that differences in the compensation of male and female corrections personnel were, at least in part, attributable to sex discrimination. Gunther v. County of Washington, 623 F.2d 1303 (9th Cir. 1979).

The panel found that under the Bennett Amendment, 42 U.S.C. § 2000e-2(h), the Equal Pay Act's four affirmative defenses were incorporated into Title VII, but its equal pay formulation was not adopted as the controlling substantive standard for all wage discrimination claims under the Civil Rights Act.[1] Accordingly, while

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[1] The Bennett Amendment provides as follows:

> It shall not be an unlawful employment practice under this subchapter for any employer to differentiate on the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provision of § 206(d) of Title 29.

The full text of § 703(h) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(h) (1976), is reproduced in the appendix to this brief.

The Equal Pay Act includes the following affirmative defenses: "(i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or

equal pay claims under Title VII or the Equal Pay Act are tested against identical criteria, Title VII's broad remedial mandate affords relief for discriminatory compensation, even when claimants cannot establish substantial equality of employment. The court instructed the district court on remand to consider evidence of intentional sex discrimination in fixing the matrons' compensation.

The defendant County subsequently petitioned for rehearing. The appellate panel, in denying that petition, filed a supplemental opinion which comprehensively analyzed the interrelationship of the Equal Pay Act and Title VII. The court

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1 (cont'd)

quality of production; or (iv) a differential based on any other factor other than sex." The full text of the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1) (1976), is included in the appendix to this brief.

emphasized that is was not substituting a "comparable" work test for the "equal" work standard, and that a Title VII plaintiff could not establish a prima facia case solely by alleging that her job requirements were comparable to those of similarly situated males. 623 F.2d at 1321. The court of appeals simply recognized a right of recovery under Title VII for claimants who demonstrate that they have been undercompensated because of intentional gender-based discrimination.

## SUMMARY OF ARGUMENT

Title VII of the Civil Rights Act of 1964 prohibits discrimination with regard to "compensation, terms, conditions, or privileges of employment" on the basis of race, color, religion, sex, or national origin. 42 U.S.C. §2000e-2(a) (1964). This is a remarkable, sweeping enactment, reflecting congressional determination

to erradicate discrimination in the work-place and to remedy injuries resulting from past discrimination. Albemarle Paper Company v. Moody, 422 U.S. 405, 421 (1975).

The petitioners urge the Court to sound retreat from this historic mandate. They contend that Congress, in approving a "technical correction" of Title VII, intended to sanction intentional gender-based wage discrimination in all cases not meeting the Equal Pay Act's equal work standard. The court of appeals properly rejected this position as inconsistent with Title VII's intent and as contrary to the Bennett Amendment's plain language, its legislative history, and its subsequent administrative interpretation and application.

Before applying the tools of statutory interpretation in defense of

the Ninth Circuit's holding, it is essential to define the nature and scope of that result. Petitioners invoke the spectre of "comparable worth," intimating that the minions of the EEOC would be loosed across the economic landscape, engaged in an endless quest of job comparison. The court of appeals did not sanction such a result. Nor do respondents espouse that result. The Ninth Circuit emphasized that a simple comparison of jobs and compensation would not state a prima facie case under Title VII. Rather, plaintiffs must present some additional evidence, proving discriminatory intent. This requirement of proof of intent or motive is common to all disparate treatment cases under Title VII. See International Brotherhood of Teamsters v. United States, 432 U.S. 324, 335 n.15 (1977); Equal Employment Opportunity

Commission Interpretive Manual 37-38 (1972).[2] Petitioners' policy-oriented concerns are unfounded; comparable work alone is not enough.

The court of appeals' construction of the Bennett Amendment as incorporating only the Equal Pay Act's four affirmative defenses is supported, indeed compelled, by the plain meaning of the statutory language. The Bennett Amendment permits gender-based differentiations in compensation if such differences are "authorized" by the provisions of the

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[2] Petitioners implicitly criticize the court of appeals for remanding for proof of discrimination under "unspecified standards." The terms of the remand were, however, consistent with this Court's practice in Title VII appeals of defining the limits of causes of action while leaving evidentiary "fine-tuning" to the trial courts. E.g., Albemarle Paper Company v. Moody, 422 U.S. 405, 422 (1975); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). The issue before the court of appeals, and now before this Court,

Equal Pay Act. Discrimination in compensating employees of different sexes who perform equal work is "authorized"--in its clearest sense, positively sanctioned--only if it is attributable to seniority, merit, output, or some factor other than sex. 29 U.S.C. § 206(d)(1). Petitioners' reading of "authorized" as "not prohibited by" is tortured and unpersuasive. The authorization language of the Bennett Amendment reflects a legislative intent to incorporate the Equal Pay Act's four affirmative defenses, not to adopt equal work-equal pay as the sole measure of wage discrimination under Title VII.

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2 (cont'd)

was whether claims of intentional discrimination which would not satisfy the Equal Pay Act's requirements are actionable under Title VII. The Ninth Circuit decided that issue and, properly, declined to speculate on what evidence of intentional discrimination might be sufficient to prove respondents' claims.

The legislative history of the Bennett Amendment is ambiguous. However, statements by Senators Bennett and Dirksen at the time the amendment was introduced seem to support the "four defenses" approach endorsed by the Ninth, Tenth, Third, and Fourth circuits.[3] The context in which the amendment was introduced, as a "technical correction" after cloture had been invoked, also supports a restrictive reading. Petitioners' reliance on Senator Bennett's characterization of the amendment, a year after its adoption, is unavailing. Not only is non-contemporaneous legislative history highly suspect, but the Senator's remarks were confusing and internally inconsistent.

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[3] Gunther v. County of Washington, 602 F.2d 882 (1979), reh. denied, 623 F.2d 1302 (9th Cir. 1980); Fitzgerald v. Sirloin Stockade, 624 F.2d 945, 953-54 & n.2 (1980); I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (4th Cir. 1980); EEOC v. Aetna Insurance Co., 616 F.2d 719, 724 n.5 (1980).

Administrative interpretation and application of the Bennett Amendment, after a period of initial confusion, espoused the "four defenses" view. The EEOC's original 1965 regulations do not "flatly" contradict its 1972 guidelines; indeed, the 1972 regulations simply reflect an explicit endorsement of the approach followed in the great majority of decisions under the original guidelines. Accordingly, the administrative endorsement of the "four defenses" construction is entitled to great deference.

The Ninth Circuit's holding is consistent with the considered authority of other courts of appeals. Contrary to petitioners' assertion, only two other appellate courts, the Third and Tenth Circuits, have squarely considered whether claims of intentional discrimination in

compensation which do not allege substantial equality of work are cognizable under Title VII. Those courts resolved the issue consistently with the Ninth Circuit's holding.[4]

Only four other courts have explicitly addressed the relationship between Title VII and the Equal Pay Act under the Bennett Amendment. Panels within the Fourth Circuit appear to have resolved the issue inconsistently.[5] The Tenth Circuit has held that a simple comparable work claim which does not allege intentional discrimination is not

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4 I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (4th Cir. 1980); Fitzgerald v. Sirloin Stockade, 624 F.2d, 945, 953-54 n.2 (1980).

5 Compare EEOC v. Aetna Insurance Co., 616 F.2d 719 724 (4th Cir. 1980) (citing Gunther) with Stastny v. Southern Bell Telephone and Telegraph Co., 625 F.2d 267, 281 (4th Cir. 1980).

actionable under Title VII.[6] And the District of Columbia Circuit has endorsed the "four defenses" approach in dictum.[7]

Finally, the court of appeals' reading of the Bennett Amendment is consistent with, and perhaps buttressed by, principles of in pari materia. That canon of construction is applied to "harmonize" the operation of statutes dealing with similar subject matter so that the application of one does not nullify the provisions of the other. 2A J. Sutherland, Statutes and Statutory Construction, §§ 51.02-51.05 (C. Sands, 4th ed. 1973) (henceforth cited as "J. Sutherland").

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6 Lemons v. City and County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 49 U.S.L.W. 3250 (U.S. Oct. 6, 1980).

7 Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978).

In this case, because of substantial differences in statutory coverage, recognition of nonequal work claims under Title VII does not nullify the Equal Pay Act. For example, plaintiffs who cannot recover under a Title VII disparate treatment claim because of an inability to prove discriminatory intent may prevail under the Equal Pay Act upon a simple showing of equal work and unequal pay. Conversely, adoption of the equal work formulation as the exclusive substantive standard for Title VII claims would render Title VII's provisions regarding gender-based wage discrimination a nullity. The Ninth Circuit's holding, consistent with in pari materia principles, reconciles the statutes and avoids this result.

## ARGUMENT

### I. THE COURT OF APPEALS' CONSTRUCTION OF THE BENNETT AMENDMENT IS CONSISTENT WITH THE INTENT OF TITLE VII.

The Ninth Circuit's reading of the Bennett Amendment produces the only result which is consistent with the broad remedial purpose of Title VII. If, as petitioners suggest, the Bennett Amendment limits Title VII's coverage of pay claims to situations in which plaintiffs can show equal work, employers would be free to pay employees in "female" job categories less solely because they are women. Title VII clearly bars this type of intentional wage discrimination on the basis of race, color, religion, or national origin. 42 U.S.C. § 2000e-2(a). The essential inquiry in interpreting the Bennett Amendment is whether Congress, contrary to the general mandate of the

Civil Rights Act, intended to insulate such discrimination against women.

Petitioners' broad reading of the Bennett Amendment conflicts with settled principles of statutory construction and is contrary to this Court's direction in interpreting Title VII. Remedial measures, including civil rights legislation, are to be "liberally construed in order that their beneficent objectives may be realized to the fullest extent possible." 4 J. Sutherland, supra, § 72.05. Conversely, exceptions such as the Bennett Amendment, which limit the sweep of such statutes, are to be narrowly construed. E.g., Piedmont and Northern R. Co. v. ICC, 286 U.S. 299, 311-12 (1932).

This Court has repeatedly invoked these principles in Title VII cases, emphasizing the breadth of the statute's mandate. Justice Stevens' observations

in Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), are exemplary:

> It is now well recognized that employment decisions cannot be predicated on mere "stereotyped" impressions about the characteristics of males or females. Myths and purely habitual assumptions about a woman's inability to perform certain kinds of work are no longer acceptable reasons for refusing to employ qualified individuals or for paying them less.

435 U.S. at 707 (footnotes omitted). See, e.g., Frank v. Bowman Transportation Co., 424 U.S. 747, 763 (1976); Alexander v. Gardner-Denver Co., 415 U.S. 36, 44 (1974).[8]

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[8] In Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978), the Court cited with approval, the following language from Sprogis v. United Air Lines, Inc., 444 F.2d, 1194, 1198 (7th Cir.), cert. denied, 404 U.S. 991 (1971):

> In forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes. Section 703(a)(1)

Petitioners' construction of the Bennett Amendment would severely limit Title VII's protections against sex-based wage discrimination. Currently, more than 20 percent of all female workers are employed in job classifications that are 95 percent or more female; more than three-fourths of women workers are in positions which

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8 (cont'd)

subjects to scrutiny and eliminates such irrational impedements to job opportunity and enjoyment which have plagued women in the past.

435 U.S. at 707 n.13. See generally Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 U. Mich. J. L.-Ref. 399, 458 n.222 (Spring 1979) (hereinafter cited as "Blumrosen").

are 75 percent female.[9] Significantly the respondent-matrons in this case held positions which, by statute, were limited to female incumbents.[10] For these women, the lack or absence of male referrents in their job classifications makes it virtually impossible to prove equal work. They would be effectively foreclosed from relief for intentional wage discrimination if the Bennett Amendment were viewed as imposing "equal work" as the sine qua

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[9] See U.S. Bureau Labor Statistics, Department of Labor, Employment and Earnings at Household Data Annual Averages (January 1980). Compare Comment, The Bennett Amendment-Title VII and Gender-Based Discrimination, 68 Geo. L. R. 1169, 1187 n.155 (1980) with Blumerosen, 12 U. Mich. J. L.-Ref. at 400 n.3. Cf. Roesel v. Joliet Wrought Washer Co., 596 F.2d 183, 185 (7th Cir. 1979) (finding Title VII violation although plaintiff "presented no evidence comparing the job she held with that held by any male").

[10] Under Oregon law, female inmates must be attended by other women. ORS §§ 137.350, 137.360.

non. of claims for gender-based wage discrimination under Title VII. So viewed, Title VII would discriminate among women, affording a remedy for wage discrimination to women holding positions with a substantial number of male incumbents, but denying such relief to women less fortuitously employed. Indeed, the Title VII plaintiffs in Los Angeles Department of Water & Power v. Manhart, supra, and General Electric Co. v. Gilbert, 429 U.S. 125 (1976), might well have been precluded from raising their claims under such a standard.

Petitioners' "exclusive standard" position would attribute to Congress an intent to treat intentional sex-based wage discrimination differently than similar discrimination on the basis of race, color, religion, or national origin. It is undisputed that non-gender related

wage discrimination is actionable under Title VII without showing equal work. See I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094, 1099-1100 (4th Cir. 1980), cert. filed, _____ U.S.L.W. _____, (1980). Quarles v. Phillip Morris, Inc., 279 F. Supp. 505 (E.D. Va. 1968), is illustrative. There, the court engaged in extensive evaluation of "comparable" "black" and "white" job classifications, in determining that two black Title VII plaintiffs were entitled to recover for racially motivated wage discrimination. 279 F. Supp. at 509-10. Petitioners would deny women who were victims of intentional wage discrimination the relief afforded plaintiffs in Quarles.

The Bennett Amendment, as construed by petitioners, would rend the fabric of Title VII, opening two substantial gaps in its protective coverage.

First, only a fraction of the female work force--those employed in job classifications with a significant number of male incumbents--would be able to recover for intentional wage discrimination. Second, women would be afforded less protection against wage discrimination than any other disadvantaged group.

If petitioners' characterization were valid, if Congress did, indeed, intend to so substantially qualify the remedial mandate of the Civil Rights Act, one would reasonably expect that the Bennett Amendment would have been extensively discussed and vigorously debated. But that was not the case. Indeed, the circumstances surrounding the amendment's introduction and adoption indicate that Congress regarded it as of limited significance.

Senator Bennett introduced his amendment as a "technical correction"

after cloture had been imposed. 110 Cong. Rec. 13647 (1964). Designation of the amendment as a "technical correction" indicates its limited purpose. Floor debate, while concededly ambiguous, was brief, and certainly not heated.[11] It is most unlikely that the Senate leadership would have allowed introduction of the amendment after imposition of cloture had it believed that the proposal would effect substantial changes in the coverage of the Civil Rights Act.

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[11] The tone and extent of debate regarding the Bennett Amendment stands in sharp contrast to that concerning other proposals to significantly limit Title VII's coverage. See 110 Cong. Rec. 2550 (1964) (amendment extending bona fide occupational qualification to race and sex); 110 Cong. Rec. 2778 (1964) (amendment to limit coverage to instances in which discrimination based "solely" on prohibited classification). See Blumrosen, 12 U. Mich. J. L.-Ref. at 480-81.

Congress did not intend to discriminate against women within the provisions of Title VII.

## II. THE LANGUAGE OF THE BENNETT AMENDMENT REFLECTS A LIMITED INTENT TO INCORPORATE THE EQUAL PAY ACT'S FOUR AFFIRMATIVE DEFENSES.

The Bennett Amendment permits gender-based differentiations in compensation if such differences are authorized by the provisions of the Equal Pay Act. "Authorize," in its ordinary sense means "[t]o empower, to give a right or authority to act." Black's Law Dictionary 122 (5th ed. 1979). Applying this definition, the only provisions of the Equal Pay Act which affirmatively sanction disparities in wages are its four affirmative defenses. Although petitioners urge the Court not to "make a fortress out of the dictionary," inquiry into the statute's meaning must begin with this definition. Lewis v.

United States, 445 U.S. 55, 60 (1980) (and cases cited therein).

Petitioners suggest, as an alternative definition, that "authorize" means "not to prohibit."[12] Thus, because the Equal Pay Act does not prohibit discrimination in cases of nonequal work, it "authorizes" such discrimination. Not only is this reading contrived and tortured,[13] but it is contrary to the

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12 Petitioners, with a note of triumphant discovery, support their converse definitional approach by invoking a definition of "authorize" as "to permit a thing to be done in the future." Black's Law Dictionary 169 (4th ed. 1968). This merely restates, rather than resolves, the question: the key is the meaning of "to permit."

13 Cf. Chandler v. Roudebush, 425 U.S. 840, 848 (1976):

> [T]he plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

premises of our constitutional system:

> Governmental authorization is not necessary to engage in the ordinary economic and social activities of life. The concept of our government as one of limited powers presupposes a freedom of action in the absence of governmental regulation rather than an ability to act only with permission or authorization from the government.

Blumrosen, 12 U. Mich. J. L.-Ref. at 482.

Petitioners' contention that a normal construction of the Bennett Amendment's authorization language would render the amendment a nullity is similarly unavailing. Because § 703 included three of the four Equal Pay Act affirmative defenses before the Bennett Amendment was adopted, petitioners reason, the amendment would have no independent meaning if its effect was only to incorporate the Equal Pay Act's defenses.

This argument is flawed in two respects. First, under a "four defenses" construction, the amendment has discrete

significance. The inclusion of the fourth Equal Pay Act defense, "a differential based on any factor other than sex," is not, as petitioners suppose, some "meaningless" make-weight which "hardly needed to be added to Title VII." Petitioners' Brief at 74. Indeed, this fourth defense was the focus of this Court's analysis in Los Angeles Department of Water & Power v. Manhart, supra. Cf. Corning Glass Works v. Brennan, 417 U.S. 188 (1974) (significance of fourth affirmative defense in Equal Pay Act action). The Bennett Amendment also insured consistent interpretation and application of defenses in equal pay actions brought under either the Equal Pay Act or Title VII, harmonizing the statutes and eliminating the possibility that employees would be subject to conflicting regulations. See, I.U.E. v. Westinghouse Electric Corp.,

631 F.2d at 1101. So viewed, the Bennett Amendment is much more than mere surplusage. Comment, The Bennett Amendment--Title VII and Gender-Based Discrimination, 68 Geo. L. J. 1169, 1188 (1980).

Conversely, petitioners' inclusive reading of the statutory authorization language would make Title VII's prohibition of gender-related wage discrimination virtually meaningless. If the Equal Pay Act describes the exclusive substantive standards for actions for sex-based wage discrimination, then Title VII's proscription of such discrimination becomes cumulative and essentially superfluous.[14] However, as petitioners' brief emphasizes,

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[14] Indeed, Title VII, by imposing the additional element of intent in disparate treatment cases, might, under petitioners' approach, be regarded as having narrowed the protection against wage discrimination.

"[a] statute should be construed so that effect is given to all its provisions, so that no part is inoperative or superfluous, void or insignificant." 2A J. Sutherland, supra, § 46.06. This rule of construction is particularly compelling when applied to employment discrimination measures because Congress has followed a practice of affording complementary and supplementary remedies in that area. Alexander v. Gardner-Denver Co., 415 U.S. 36, 48 (1974). The court of appeals' reading of the Bennett Amendment conforms to these principles.

## III. THE LEGISLATIVE HISTORY OF THE BENNETT AMENDMENT, WHILE AMBIGUOUS, GENERALLY SUPPORTS THE "FOUR DEFENSES" CONSTRUCTION.

Legislative commentary concerning the Bennett Amendment is, at best, murky. The most plausible reading of the limited legislative history, however, is that in areas of overlap between

Title VII and the Equal Pay Act--equal pay actions under Title VII--Congress intended the Equal Pay Act's affirmative defenses, with corresponding judicial and administrative interpretations, to apply.

Contemporaneous comments by Senators Bennett and Dirksen correspond with the "four defenses" construction. Senator Bennett, in introducing the amendment, noted the possibility of "conflict" between Title VII and the Equal Pay Act and stated that the purpose of his "correction" was "to provide that in the event of conflict, the provisions of the Equal Pay Act shall not be nullified." 110 Cong. Rec. 13647 (1974). Contrary to petitioners' contentions, the court of appeals' reading of Title VII does not "nullify" the Equal Pay Act in areas of

overlap. The zone of statutory intersection or "conflict" is limited: claims of discrimination in compensation for equal work. The Bennett Amendment insures that when such discrimination is alleged in a Title VII action, Equal Pay Act standards will govern.

Senator Dirksen's statements reflect a clear understanding that the Bennett Amendment's purpose was limited to incorporating the Equal Pay Act's defenses:

> We were aware of the conflict that might develop because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.
>
> All that the pending amendment does is recognize those exceptions that are carried in the basic Act.

110 Cong. Rec. 13647 (1964)(emphasis added). The "exceptions" to which Senator Dirksen referred were the Equal Pay Act's four affirmative defenses. Petitioners suggest

that Senator Dirksen may have been referring to the exemptions from coverage under the Fair Labor Standards Act, including exemption of "white collar" workers, 29 U.S.C. § 213, and that he viewed the Bennett Amendment as limiting Title VII's wage discrimination protections to employees within the coverage of the Fair Labor Standards Act. Neither the courts nor the EEOC have, however, ever given the Bennett Amendment such a construction. Moreover, it may be reasonably assumed that had Senator Dirksen's colleagues attributed the same significance to his remarks that petitioners do, had they believed the Bennett Amendment so drastically limited Title VII's protections, legislative commentary on the "technical correction" would have been more extensive --and more revealing.

Petitioners cite statements by Senator Clark and Representative Celler as supporting an "exclusive standard" construction. These comments, however, are ambiguous and internally inconsistent. Senator Clark, answering an "unfounded" objection that Title VII's sex discrimination provisions extended "far beyond the scope and coverage of the Equal Pay Act" and did not include "the limitation in that act with respect to equal work on jobs requiring equal skills in the same establishments," offered the following response:

> The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for discrimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII.

110 Cong. Rec. 7217 (1964) (emphasis added). This statement is significant in three respects. First, Senator Clark's observation that the Equal Pay Act's coverage and exemptions differ from those of Title VII implicitly supports a conclusion that equal work was not to be the exclusive standard for wage discrimination actions under Title VII.[15] Second, petitioners assert that because Senator Clark's purpose was to respond to unfounded criticisms, his comments must support the converse construction of the statutes; that is, if the objection that Title VII did not include the "equal work" standard was "unfounded," the statute must incorporate that standard. This characterization of Senator Clark's "answers"

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13 See Gitt and Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy. Univ. Chi. L. J. 723, 746-47 (1977) (hereinafter cited as "Gitt and Gelb").

is not necessarily valid. Certainly, Senator Clark's comments regarding the scope of Title VII did not respond to the criticism that Title VII's coverage extended beyond that of the Equal Pay Act. Certainly, that objection was not unfounded. Finally, even if Senator Clark's remarks regarding incorporation of the equal work standard were responsive, they were, at best, an ambiguous response. The conclusion that Equal Pay Act standards "are applicable to the comparable situation under Title VII" is consistent with either a "four defense" or an "exclusive standard" construction.

Representative Celler's comments are of similarly limited value. In presenting the amended Civil Rights Act to the House of Representatives, Representative Celler stated that the Bennett Amendment:

> provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex--Section 703(b).

110 Cong. Rec. 15896 (1964).[16] This statement must be discounted as inaccurate. Either Representative Celler misapprehended the significance of the Bennett Amendment or oversimplified its meaning for explanatory purposes.

Compliance with the Fair Labor Standards Act would not satisfy "the requirement of the title barring discrimination because of sex." Title VII prohibits a range of discriminatory conduct, including discrimination in hiring, promotion, transfer, and discharge, which does not fall within the terms of the Equal Pay

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16 Representative Celler's reference to Section 703(b) must be regarded as a misstatement. It may be assumed, reasonably, that he was referring to the general prohibitions of Section 703(a).

Act. 42 U.S.C. § 2000e-2 (1976). Petitioners contend that Representative Celler did not need to specify that the Bennett Amendment applied only to discrimination in compensation because the amendment, by its terms, makes that clear. Even under this view, however, Representative Celler's remarks were inaccurate. While the Equal Pay Act applies only to payment of wages, Title VII prohibits discrimination with respect to other forms of compensation. Cf. Los Angeles Department of Water & Power v. Manhart, supra (discrimination in pension fund assessment). Most importantly, the coverage of the two statutes differs dramatically. While Title VII applies to employees of an "industry affecting commerce", 42 U.S.C. 2000e(b), the Equal Pay Act has a much narrower scope, covering only employees "engaged in commerce or in the production

of goods for commerce," 29 U.S.C. § 203 (1976). Exemptions are also substantially different. Accordingly, if Representative Celler's remarks are to be given any meaning, it must be that Equal Pay Act standards govern when equal work-equal pay claims are brought under Title VII.

Petitioners also rely on statements by Senator Bennett in 1965, a year after the enactment of Title VII. Senator Bennett presented a law review article and an accompanying memorandum prepared by his staff in an attempt to state his understanding of the amendment. Petitioners emphasize Senator Bennett's statement that, under the amendment, "compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act." 111 Cong. Rec. 13359.

Under fundamental principals of statutory construction, this sort of retrospective legislative history is entitled to little, if any, weight. See generally R. Dickerson, The Interpretation and Application of Statutes, 179-83 (Little, Brown 1975). In fact, Senator Clark, referring to these principles, subsequently dismissed Senator Bennett's ex post facto commentary as irrelevant.[17]

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[17] Senator Clark's remarks, in pertinent part, were as follows:

> "Mr. President, as all Senators know, legislative history cannot be written after the fact . . . . [T]he intent of Congress in enacting particular legislation must be discovered from the words of the enactment themselves, and through explanatory colloquy prior to the enactment if such is available, but never through explanations made on the Senate floor long after enactment."

111 Cong. Rec. 18263 (1965).

Whatever the propriety of examining subsequent legislative commentary, Senantor Bennett's remarks are more confusing than compelling. This is best illustrated in an excerpt from the staff memorandum on which he relied:

> Section 6(d) authorizes two things:
>
> 1. Wage differentials as between exempt male and female workers doing the same work; and
>
> 2. Wage differentials on equal jobs made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity of production; or (iv) a differential on any other factor other than sex.
>
> The amendment therefore means that it is not an unlawful employment practice (a) to differentiate on the basis of sex in determining the compensation of white-collar and other employees who are exempt under the provisions of the Fair Labor Standards Act or (b) to have different standards of compensation for non-exempt employees when such differentiation is not prohibited by the Equal Pay Amendment to the Fair Labor Standards Act.

111 Cong. Rec. 18263 (1965).

The staff definition of "authorized" which Senator Bennett endorsed, supports the "four defenses" position. The Equal Pay Act authorizes sex-based wage discrimination among exempt employees doing equal work; it does not sanction discrimination among nonexempt parties doing nonequal work. This directly contradicts the conclusion that Title VII and the Equal Pay Act are coextensive. The memorandum further endorses the discredited view that the Equal Pay Act's exemptions apply to Title VII under the Bennett Amendment. Senator Bennett's retroactive commentary is inconsistent and inaccurate and should be disregarded.[18]

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[18] If the Court determines that subsequent legislative history is to be considered, the report of the Senate Committee on Human Resources on the 1978 Pregnancy amendments to Title VII clearly endorses the "four defense." That report reads, in relevant part, as follows:

## IV. THE LIMITED ADMINISTRATIVE INTERPRETATION OF THE BENNETT AMENDMENT IS ENTITLED TO GREAT DEFERENCE.

The court of appeals' holding was consistent with administrative interpretation and application of the Bennett Amendment. In 1972, the EEOC issued supplemental guidelines on sex discrimination. The regulation defining the relationship of Title VII to the Equal Pay Act, 29

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18 (cont'd)

> [T]he Bennett Amendment . . . provides that if a practice is authorized by the Equal Pay Act, 29 U.S.C. § 206(c)--that is, if it is within one of the four enumerated exceptions to the Equal Pay Act--then it is not unlawful under Title VII.
>
> * * * *
>
> It is the Committee's opinion that any application of the Bennett Amendment which assumes that the provision insulates from Title VII all compensation and fringe benefits programs which do not violate the Equal Pay Act is not correct . . . .

S. Rep. No. 95-331, 95th Cong., 1st Sess. 5, 11 (1977).

C.F.R. § 1604.8, provides, in pertinent part, as follows:

> (a) The employee coverage of the prohibitions against discrimination based on sex contained in Title VII is coextensive with that of other prohibitions contained in Title VII and is not limited by § 703(h) to those employees covered by the Fair Labor Standards Act.

37 Fed. Reg. 6836 (1972). Petitioners concede that this regulation reflects administrative endorsement of the "four defenses" construction but argue, under the authority of General Electric Co. v. Gilbert, 429 U.S. 125, 142 (1976), that the EEOC's interpretation should not be accorded deference.

In General Electric Co. v. Gilbert, supra, this Court gave little weight to a 1972 EEOC regulation which "flatly contradicted" an earlier agency position expressed in a General Counsel's letter, issued shortly after the enactment of Title VII. Gilbert's reasoning

does not apply in this case. The Commission's 1972 guidelines do not contradict its 1965 regulations, and since 1967, the EEOC has consistently interpreted the Bennett Amendment as incorporating only the Equal Pay Act's affirmative defenses.

The 1965 antecedent of 29 C.F.R. § 1604.8, formerly codified at 29 C.F.R. § 1604.7, read in relevant part as follows:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act (Section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations in which both statutes are applicable. Accordingly, the Commission interprets Section 703(h) to mean that the standards of "equal pay for equal work" set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in Section 703, and is not limited by Section 703(h) to those employees covered by the Fair Labor Standards Act.

30 Fed. Reg. 14928 (1965)(emphasis added). The language of the last sentence of this regulation is nearly identical to that of 29 C.F.R. § 1604.8(a).

Petitioners contend, however, that the second sentence of the regulation mandates incorporation of the equal work-equal pay standard, contradicting the 1972 guideline. They read this language in a vacuum. The regulation's introductory sentence emphasizes that Equal Pay Act standards are to control only in cases in which both statutes apply. The regulation does not, however, define that zone of statutory intersection. Certainly, it does not provide that only equal work discrimination claims are actionable under Title VII.

Petitioners point out, correctly, that on some occasions in 1965 and 1966, the EEOC, by implication, appeared to

adopt the "exclusive standard" interpretation of the Bennett Amendment.[19] However, agency opinions and decisions during that initial period also endorsed the "four defenses" position. In an opinion letter of October 12, 1965, described in a 1969 law review article, the EEOC's General Counsel stated that the Bennett Amendment:

> [M]erely incorporates by reference into Title VII the enumerated defenses set forth in the Fair Labor Standards Act (which were added to that act by the Equal Pay Act of 1963), together with such interpretative

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19 In addition to several opinion letters, petitioners cite a 1967 inter-office memorandum from the EEOC's acting general counsel to the director of the Albuquerque regional office. (Petitioners' Brief at 87-88.) That document was not an official statement of the Commission's policies, nor were the opinion it expressed subject to Commission approval. Accordingly, it is of no relevance here. See Sprogis v. United Air Lines, Inc., 444 F.2d 1194, 1200 (7th Cir.), cert. denied, 404 U.S. 991 (1971).

> rulings thereon as the wage-hour administrator has made or may make.[20]

Similarly, the Commission in a 1968 decision holding that an airline practice of hiring only women as stewardesses and of terminating stewardess-employees after their thirty-second birthdays violated Title VII, noted that this holding was "analogous" to earlier decisions, including one issued in 1966, which proscribed sex-based discrimination in compensation for unequal work. Dodd v. American Air Lines, Inc., (June 20, 1968), 1973 EEOC Dec. (CCH) ¶ 6001.[21]

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20 See Kanowitz, Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil Rights Act and the Equal Pay Act of 1963, 20 Hastings L. J. 305, 344-46 (1968).

21

> "An analogy may be drawn from Commission Decisions, finding discrimination based on race or sex where all the incumbents of a particular job classification are Negro or female and the wage rate for that

The Commission's pronouncements in 1965 and 1966 did not "flatly contradict" its subsequent position. Rather, agency policy duing this "shakedown" period was unsettled and ambiguous. After this initial uncertainty, however, the EEOC's interpretation of the Bennett Amendment was fixed. From 1967 on, Commission decisions applying the 1965 guidelines consistently endorsed the "four defenses" construction. The Commission's

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21 (cont'd)

> classification is suppressed as compared with comparable work performed by white or male employees in other job classifications or in other plants in the industry.
>
> Commission Decision issued April 17, 1968, in case No. A U 7-3-173; and Commission Decision and Supplemental Decision issued on August 8 and September 16, 1966, respectively, in case Nos. 5-12-3175 through 5-12-3179."

1973 EEOC Dec. 4005, 4008-09 n.22.

observations in a 1971 opinion, holding that gender-related discrimination in compensating employees performing nonequal work violated Title VII, are illustrative:

> Section 6(g) of the Fair Labor Standards Act "authorizes" a pay differential for equal work when certain conditions are met. Here we are not concerned with a situation encompassed by the Equal Pay Act in that "equal work" is not involved.
>
> * * * *
>
> The above-quoted provision of Section 703(h) was intended to insure consistency in the administration of Title VII and the Equal Pay Act. Since the policy at issue here is not within the intended scope of the Equal Pay Act, it clearly cannot be "authorized" by that Act within the meaning of Section 703(h) of Title VII.

Dec. No. 71-2629 (June 25, 1969) 1973 EEOC Dec. (CCH) ¶ 6300. Accord, Dec. No. 70-695 (April 13, 1970) 1973 EEOC Dec. (CCH) ¶ 6148; Dec. No. 70-112 (September 5, 1969) 1973 EEOC Dec. (CCH) ¶ 6108. Again, these decisions were

under the "contradictory" 1965 regulation.

The EEOC's interpretation and application of the Bennett Amendment has been consistent and persuasive. It is entitled to "great deference". Griggs v. Duke Power Co., 401 U.S. 424, 433-34 (1971).

## V. THE NINTH CIRCUIT'S HOLDING IS CONSISTENT WITH DECISIONS OF OTHER COURTS OF APPEALS.

Petitioners contend that the Court of Appeals' decision in this case is contrary to the law of five other circuits. Close examination of the cases, however, shows this "conflict" to be illusive, not real. Only two other courts have directly addressed the questions raised in this appeal, and their resolution of those issues parallels the Ninth Circuit's.

I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (4th Cir. 1980), petitioners concede, is consistent with

Gunther. There, the Third Circuit, citing Gunther favorably, concluded that there was no evidence that Congress intended the Bennett Amendment to so weaken Title VII "so as to authorize. . . explicit discrimination in compensation." 631 F.2d at 1107. The Tenth Circuit in Fitzgerald v. Sirloin Stockade, 624 F.2d 945 (1980), construed Title VII similarly. The court reasoned that because the Bennett Amendment incorporated only the Equal Pay Act's affirmative defenses, plaintiff was not required to show equal work to recover for intentional wage discrimination under Title VII. 624 F.2d at 953-54 & n.2.

Two other courts of appeals have analyzed the Bennett Amendment and endorsed the "four defenses" construction, adopted by the Ninth Circuit. In Laffey v. Northwest Airlines, Inc., 567 F.2d. 429 (1976), cert. denied, 434 U.S. 720 (1978),

the District of Columbia Circuit explained its reasoning as follows:

> The legislative history of Title VII yields no hint that the guarantee of non-discriminatory compensation was extended only to minorities not embraced within the Equal Pay Act. Title VII refers specifically to the Equal Pay Act and states that a sex-predicated differential is immune from attack under Title VII only if it comes within one of the four enumerated exceptions to the Equal Pay Act.

567 F.2d at 446. More recently, the Fourth Circuit, citing Gunther, defined the relationship between the Equal Pay Act and Title VII in the following manner:

> Both the Equal Pay Act and Title VII of the Civil Rights Act, 42 U.S.C. § 2000e-2, protect workers against sexual discrimination in employment. The EPA, however, is more limited in its scope, applying only to claims of unequal pay for equal work based upon sex. Title VII is broader and affords a worker the opportunity to challenge other discriminatory compensation practices. Section 2000e-2(h) specially provides that the four exemptions in the EPA apply to actions brought pursuant to Title VII

> which claim sexual discrimination in wages or compensation paid or to be paid. See Gunther v. County of Washington, 602 F.2d 882, 888-91 (9th Cir. 1979).

EEOC v. Aetna Insurance Co., 616 F.2d 719, 724 n.5 (4th Cir. 1980).

Each of these opinions, by five courts of appeals, reflects careful, sometimes comprehensive, consideration of the Bennett Amendment, its history, and its implications. This is in direct contrast to the decisions which petitioners cite to support their claim that the Ninth Circuit's holding was contrary to the law of five circuits.

Four of the ostensibly conflicting cases which petitioners cite involved conventional equal pay claims brought under Title VII. DiSalvo v. Chamber of Commerce, 568 F.2d 593 (8th Cir. 1973); Calage v. University of Tennessee, 544 F.2d

297 (6th Cir. 1977); Orr v. Frank F. MacNeill and Son, Inc., 511 F.2d 166 (5th Cir.), cert. denied, 423 U.S. 865 (1975); Ammons v. Zia Co., 448 F.2d 117 (10th Cir. 1971). The courts in these cases implied in dicta that Title VII plaintiffs must meet the Equal Pay Act's requirements if they are to prevail in wage discrimination actions. These courts, however, had no need to consider--and did not consider--whether a wage discrimination claim based on a theory other than equal pay must satisfy the standards of the Equal Pay Act. Significantly, opinions in none of these cases even addressed the relationship between Title VII and the Equal Pay Act under the Bennett Amendment, the crucial element of the Ninth Circuit's analysis.

Inconsistency, if any, must be gleaned from either Lemons v. City and

County of Denver, 620 F.2d 228 (10th Cir.), cert. denied, 49 U.S.L.W. 3250 (U.S. Oct. 6, 1980), or Stastny v. Southern Bell Telephone and Telegraph Co., 628 F.2d 267 (4th Cir. 1980).

The plaintiff nurses in Lemons did not allege that the city had intentionally discriminated between its male and female employees. Instead, they sought relief under a comparable work theory, asserting that the city's classification and pay plan perpetuated historical gender-related inequities in compensation by fixing the compensation of public employees by reference to the pay for like work in the community. The plaintiffs argued that their position should be classified and their wages fixed, not by comparison with other nurses in the community, but by reference to non-nursing administrative positions within

the city. The Tenth Circuit rejected this comparable work approach.

Respondents in this case did not assert a comparable work concept. Nor did the Ninth Circuit's holding endorse such an approach. Instead, the court ruled that intentional wage discrimination is actionable under Title VII, a question not before the Lemons panel.[22]

Stastny v. Southern Bell is of uncertain significance. That case had many of the hallmarks of the equal pay-based decisions discussed above; indeed, Judge McMillan's opinion for the district court includes a heading titled "Back Pay on Account of Failure to Pay Women Equally for Equal Work." 458 F. Supp.

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[22] It is reasonable to assume that had this issue been presented in Lemons, the panel's holding would have conformed to the Tenth Circuit's earlier decision in Fitzgerald. Judge Holloway was a member of both panels.

314, 352 (W.D.N.C. 1978). However, the district court opinion also described wilfull and pervasive discrimination by the defendant. It is unclear whether plaintiffs asserted intentional discrimination as a basis for recovery, independent of their equal pay claim. Consequently, it is unclear from the Fourth Circuit's summary treatment of the individual plaintiffs' wage claims whether the court rejected intentional discrimination as a separate basis for recovery or simply held that the plaintiffs had not established the requisite equality of work for an equal pay claim under Title VII.[23]

Five courts of appeals have construed the Bennett Amendment narrowly.

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[23] It is significant that the Stastny opinion does not refer to the Fourth Circuit's earlier analysis of the Bennett Amendment in EEOC v. Aetna Insurance Company, supra.

None has a rejected a claim of intentional discrimination under Title VII because equal work was not proved. The Ninth Circuit's holding exemplified reasoned judicial interpretation of Title VII.

## VI. THE COURT OF APPEALS' HOLDING IS MOST CONSISTENT WITH PRINCIPLES OF IN PARI MATERIA CONSTRUCTION.

Under the in pari materia canon of statutory interpretation, statutes which pertain to the same conduct are to be "harmonized." 2A J. Sutherland, supra, § 51.05. Petitioners repeatedly invoke this principle, asserting that it requires superimposition of the equal work standard onto Title VII. This contention is, however, doubly flawed. It is doubtful that Title VII and the Equal Pay Act are so related that in pari materia principles apply. Moreover, even if reference to those principles is appropriate, they

are most compatible with a "four defenses" construction of the Bennett Amendment.

Sutherland, in his treatise on statutory construction, defined the limited context in which the in pari materia canon applies:

> Statutes are to be considered in pari materia . . . when they relate to the same person or thing, or to the same class of persons or things, or have the same purpose or object. As between characterization of the subject matter with which a statute deals and characterization of its object or purpose, the latter appears to be the more important factor in determining whether different statutes are closely enough related to justify interpreting one in light of the other. For example, it has been held that where the same subject is treated in several acts having different objects the rule of in pari materia does not apply.

2A J. Sutherland, supra, § 51.05. Although the Equal Pay Act and the sex discrimination provisions of Title VII relate, generally, to the "same class of persons," their purposes and coverage

are very different. The two statutes, while enacted only a year apart, were products of different times and represent a response to different needs.

The Equal Pay Act of 1963 was, essentially, economic legislation, enacted as an amendment to the Fair Labor Standards Act. While legislative history reflects some discussion of intentional wage discrimination, the Act was not--and did not purport to be--a comprehensive anti-discrimination measure.[24] Most significantly, the Act prohibited simple "differentiations," not discrimination, in wage

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24 In Corning Glass Works v. Brennan, 427 U.S. 188 (1974), the Court described the economic rationales for the Equal Pay Act as follows:

> The whole purpose of the Act was to require that these depressed wages be raised, in part as a matter of simple justice to the employees themselves, but also as a matter of market economics, since Congress recognized as well that discrimination in wages on the basis of sex "constitutes an unfair method of competition."

payments. Discriminatory intent need not be proved in an Equal Pay Act action. Corning Glass Works v. Brennan, 417 U.S. 188, 195 (1974).

Petitioners make much of congressional refusal to adopt the "comparable work" standard in the Equal Pay Act. This is not so significant as it might seem. Congress rejected the "comparable work" formulation for a number of reasons, including concern that because of the standard's flexibility, women workers

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24 (cont'd)

417 U.S. at 207 (citation omitted). Cf. 109 Cong. Rec. 9193 (1963) (remarks of Rep. St. George) (Equal Pay Act "the first step in the right direction"). See S. Rep. No. 176, 88th Cong., 1st Sess. 2 (1963); H.R. Rep. No. 309, 88th Cong., 1st Sess. 2-3 (1963).

would not be adequately protected.[25] It must also be emphasized, that to the extent Congress was concerned with the implications of free-wheeling job comparison, that concern focused on legislation which imposed liability upon a simple showing of differentiation. Congress did not, in 1963, consider or resolve the problem of intentional discrimination in compensation for non-equal work.

Discrimination, not differentiation, was the object of the Civil Rights Act of 1964. The most comprehensive civil

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[25] The comments of Representative St. George, who in 1962 introduced the original amendment substituting "equal" for "comparable," reflect this concern. 108 Cong. Rec. 14767, 14770 (1962). See Gitt and Gelb, supra, at 738-39. In introducing her amendment, Representative St. George was not, however, endorsing a narrow standard of equality. "Equal work," when initially added to the 1962 equal pay legislation, had a much broader meaning than the "substantial similarity" definition which the courts subsequently developed. Id. at 740-41. See 109 Cong. Rec. 9761 (1963) (remarks of Sen. McNamara).

rights measure of this century, it epitomized a new national consciousness and commitment prompted, perhaps accelerated, by the events of the summer and fall of 1963.

The Civil Rights Act differed from the Equal Pay Act not only in purpose and historic context, but also in coverage and procedure. Title VII's coverage was much broader than the Equal Pay Act's; its exclusions, much more limited.[26] The statutes also describe different exhaustion requirements,[27] and different mechanisms for recovery of

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26 See pages 41-43, supra.

27 Compare 42 U.S.C. § 2000e-5(f)(1) (1976) (plaintiff must file complaint with EEOC for 180 days and secure agency approval before instituting action in federal court) with 29 U.S.C. § 216(b) (1976) (Equal Pay Act action may be filed immediately in federal or state court).

back pay.[28] Most importantly, for purposes of this appeal, a plaintiff raising a claim of disparate treatment under Title VII must, unlike an Equal Pay Act claimant, prove discriminatory intent. International Brotherhood of Teamsters v. United States, 431 U.S. 324, 335 n.15 (1977).

The historical, substantive, and procedural differences between the Equal Pay Act and Title VII are so significant that principles of in pari materia are inapposite. If, however, that canon of construction is germaine, it lends additional support to the "four defenses" position.

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28 Compare 29 U.S.C. § 216(c) (1976) (recovery period of three years for willful violation of Equal Pay Act) with 42 U.S.C. § 2000e-5(g) (1976) (recovery period limited to two years prior to date charges filed with EEOC). See 29 U.S.C. § 216(b) (1976) (allowing double back pay awards, permitting recovery of liquidated damages in amount equal to back pay).

Under precepts of in pari materia, "[w]here there is no clear intention otherwise, a specific statute will not be construed or nullified by a general one, regardless of the priority of enactment." Radzanower v. Touche, Ross & Co., 426 U.S. 148, 153 (1976) quoting Morton v. Mancari, 417 U.S. 535, 550-51 (1974). This does not require a coterminous construction of similar statutes. Rather, such statutes "should be harmonized, if possible." J. Sutherland, supra, § 51.03.

The "four defenses" construction of the Bennett Amendment is most consistent with these goals. Contrary to petitioners' contention that this reading would "nullify" the Equal Pay Act, the Equal Pay Act would continue to have independent signficance, affording relief for employees who are unable to prove discriminatory intent but who can demonstrate substantial

similarity of work. Conversely, under petitioners' construction of the Bennett Amendment, the Equal Pay Act is either nullified or Title VII's wage discrimination provisions become essentially meaningless. If the equal work standard governs gender-based wage discrimination actions under Title VII, then the Equal Pay Act is swallowed whole by Title VII; its exemptions are drowned by Title VII's broader coverage, and its prophylactic, simple differentiation approach falls victim to Title VII's requirement of proof of discriminatory intent. If, on the other hand, the Equal Pay Act's exemptions and "differentiation" standard apply to Title VII, Title VII's wage discrimination provisions are an echo, superfluous and meaningless.

Congress cannot have intended such a result. It created a range of

remedies, complementary and overlapping measures which are to be broadly construed to eradicate "a historic evil of national proportions." McDonnell Douglas Corp. v. Green, 411 U.S. 792, 801 (1973).[29] Congress cannot have intended to sanction intentional discrimination. Congress did not discriminate against women within the provisions of Title VII.

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29 In direct contrast to this system of supplementary remedies, were the conflicting statutes in United States v. United Continental Tuna, 425 U.S. 164 (1976), which petitioners cite. There, both the Public Vessels Act and the Suits in Admiralty Act purported to provide the exclusive remedy for claims within their coverage.

## CONCLUSION

For all the foregoing reasons, respondents respectfully request that the opinions and order entered by the United States Court of Appeals for the Ninth Circuit in this matter be affirmed.

Respectfully submitted,

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APPENDIX

1. Section 703(a) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(a) (1976), reads as follows:

It shall be an unlawful employment practice for an employer--

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin or;

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would

deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

2. Section 703(h) of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e-2(h) (1976), reads as follows:

Notwithstanding any other provision of this subchapter, it shall not be an unlawful employment practice for an employer to apply different standards of compensation, or different terms, conditions, or privileges of employment pursuant to a bona fide seniority or merit system, or a system which measures earnings by quantity or quality of production or to employees who work in different locations,

provided that such differences are not the result of an intention to discriminate because of race, color, religion, sex or national origin, nor shall it be an unlawful employment practice for an employer to give and to act upon the results of any professionally developed ability test provided that such test, its administration or action upon the results is not designed, intended or used to discriminate because of race, color, religion, sex or national origin. It shall not be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29.

3. The Equal Pay Act of 1963, 29 U.S.C. § 706(d)(1) (1976), reads as follows:

No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or

(iv) a differential based on any other factor other than sex: Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee.

No. 80-429

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

*Petitioners,*

—v.—

ALBERTA GUNTHER, VELENE M. VALLANCE, MARION E. VANDER ZANDEN, AND YVONNE M. HATTON,

*Respondents.*

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

**BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NOW LEGAL DEFENSE AND EDUCATION FUND, WOMEN'S LEGAL DEFENSE FUND, LEAGUE OF WOMEN VOTERS OF THE UNITED STATES, WOMEN EMPLOYED, COMPARABLE WORTH PROJECT, AMERICAN NURSES ASSOCIATION, WISCONSIN WOMEN'S NETWORK, WORKING WOMEN, THE NATIONAL HOOK-UP OF BLACK WOMEN, FEDERALLY EMPLOYED WOMEN, AMERICANS FOR DEMOCRATIC ACTION, ANTIOCH SCHOOL OF LAW WOMEN'S RIGHTS CLINIC, and NATIONAL WOMEN'S POLITICAL CAUCUS, *AMICI CURIAE***

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## INTEREST OF AMICI CURIAE*

The American Civil Liberties Union is a nationwide, nonpartisan organization of over 200,000 members dedicated to defending the right of all persons to equal treatment under the law. Recognizing that restriction of women's opportunities is a pervasive problem, the ACLU has established a Women's Rights Project to work toward the elimination of gender-based discrimination.

The ACLU has participated in virtually every case before this Court involving interpretation of Title VII's ban on sex discrimination. The Union acted as amicus curiae in Phillips v. Martin

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*Letters from counsel for both Respondents and Petitioners consenting to the filing of this brief are being filed with the Clerk.

Marietta Corp., 400 U.S. 532 (1971), concerning an employer practice of refusing to hire mothers of preschool-age children; in Wetzel v. Liberty Mutual Insurance Co., 511 F.2d 199 (3d Cir. 1975), vacated on juris. grounds, 424 U.S. 737 (1976), and General Electric Co. v. Gilbert, 429 U.S. 125 (1976), both concerning the Title VII rights of working women disabled by pregnancy; in Dothard v. Rawlinson, 433 U.S. 321 (1977), applying disparate impact principles to bar application of height and weight requirements which disportionately excluded women from employment, and allowing only a narrow exception to sex-neutral hiring standards for prison guards in Alabama's brutal maximum-security penitentiaries; in Nashville Gas Co. v. Satty, 434 U.S. 136 (1977), striking down an employer practice of denying female workers returning from childbirth leaves of job-

bidding seniority; and in City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), in which an employer practice of withholding more from women's salaries than from men's salaries for pension plan contributions was held to constitute sex discrimination under Title VII.

The ACLU has also participated in most of the cases before this Court challenging sex-based discrimination under the Fifth and Fourteenth Amendments. Lawyers associated with the ACLU presented the appeal in Reed v. Reed, 404 U.S. 71 (1971), represented amicus curiae in Frontiero v. Richardson, 411 U.S. 677 (1973), represented the appellant in Kahn v. Shevin, 416 U.S. 351 (1974), the appellees in Edwards v. Healy, 421 U.S. 772 (1975), Weinberger v. Wiesenfeld, 420 U.S. 636 (1975), and Califano v. Goldfarb, 430 U.S. 199 (1977), petitioners in Struck v. Secretary of

Defense, 460 F.2d 1372 (9th Cir. 1971, 1972), cert. granted, 409 U.S. 947, judgment vacated and case remanded for consideration of mootness, 409 U.S. 1071 (1972), and Turner v. Department of Employment Security, 423 U.S. 44 (1975), and acted as counsel for petitioners, appellants, appellees, and amicus curiae in this Court in several other gender discrimination and women's rights cases. Currently, ACLU lawyers are co-counsel in Rostker v. Goldberg, No. 80-251, challenging male-only draft registration.

The NOW Legal Defense and Education Fund is a nonprofit civil rights organization established in 1970 to perform a broad range of legal and educational services nationally in support of women's efforts to eliminate sex-based discrimination and secure equal rights. It was established by the National Organization for Women, a national membership organization

of over 110,000 men and women in 700 chapters throughout the country. The NOW Legal Defense and Education Fund has participated in numerous cases to secure enforcement of legal provisions barring employment discrimination.

The Women's Legal Defense Fund is a nonprofit, tax exempt membership organization founded in 1971 to provide pro bono legal assistance to women who have been discriminated against on the basis of sex. The Fund devotes a major portion of its resources to combating sex discrimination in employment through litigation of significant employment discrimination cases, operation of an employment discrimination counselling program, and agency advocacy before the EEOC and other federal agencies that are charged with enforcement of the equal opportunity laws.

League of Women Voters of the United States is a nonpartisan, tax-exempt non-

profit membership corporation, organized under the laws of the District of Columbia with the current membership of 117,000 in 1400 state and local Leagues located in all states, the District of Columbia, Puerto Rico and the Virgin Islands. Since its inception in 1920, the League's purpose has been to promote political responsibility through informed and active participation of citizens in government. The League believes that no person or group should suffer legal, economic, or administrative discrimination. The League is committed to the eradication of any form of discrimination that results in the undervaluation of work performed by women and minorities.

Women Employed is a non-profit organization of working women based in Chicago, Illinois, with over 2000 members who work at all levels of employment, in banks, insurance companies, stock brokerages,

engineering firms, law firms, government agencies, and all types of corporations. Women Employed has a five-year history of protecting the rights of working women by filing charges of employers' discriminatory practices with the EEOC and other government agencies to obtain appropriate remedies, and by monitoring the enforcement efforts of these government agencies on both local and national levels.

The Comparable Worth Project is a legal education and organizing project located in California whose goal is to support women workers in their efforts to eliminate economic and social discrimination in the workplace through networking, education, and advocacy. The Project maintains a clearinghouse of information on a range of topics relevant to the fact that women are not paid equally for work of equal value. Working with working women, labor unions, the general community,

public officials and employer representatives, the Project provides a speaker's bureau, technical assistance and research as well as counselling service.

The American Nurses Association (ANA), a predominantly female organization of 180,000 registered professional nurses, has always espoused equality of opportunity for all. The ANA condemns all forms of discrimination based upon race, sex, religion, or national origin.

The Wisconsin Women's Network is a coalition of Wisconsin organizations and individual women and men who have banded together to facilitate coordination, provide a common system, and strengthen advocacy for women's issues. The Network has a state-wide task force on employment equity and is in touch with individuals who constitute the class affected by this principle.

Working Women is a membership organization, with local affiliates in thirteen major cities, and with a membership spanning all fifty states. Working Women work for rights and respect for women office workers by raising the concerns of its members on public issues, pressuring the government to enforce the laws protecting women's rights, and persuading employers to institute fair employment practices.

The National Hook-up of Black Women is a national black women's advocacy group which supports pay equity for women and minority workers.

Federally Employed Women, a national membership organization, with over 240 chapters, has supported the concept of pay equity for women since the inception of the organization in 1978. The founding principles of the organization were to enhance the position and potential of women in government, increase job opportunities,

improve the merit system, and provide assistance to employees who encounter sex discrimination in the federal government.

Americans for Democratic Action is an independent political and legislative action and multi-issue organization organized in 1947. Support of the concept of pay equity is a major priority of the organization this year because it believes this to be a major step necessary to promote civil rights.

Antioch School of Law Women's Rights Clinic has been involved in the area of sex-based employment discrimination, specifically wage discrimination, for several years and was one of the co-sponsors of a conference on pay equity held in Washington, D.C. in October 1979. It has an on-going program of employment discrimination litigation.

The National Women's Political Caucus is a nationwide, multi-partisan membership organization with 45,000 members in 300 state and local caucuses across the country. The National Women's Political Caucus is dedicated to the education and full participation of women in all aspects of the political process.

## STATEMENT OF THE CASE

In this Title VII sex discrimination case filed in July, 1974, four women who worked as female guards[1/] at a county jail contended that they were denied equal pay for doing work substantially equal to that performed by male guards, and alternatively, that even if the work was not substantially "equal," some of the discrepancy in pay could be explained only by sex discrimination.

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[1/] The positions held by the plaintiffs were titled jail "matrons" by the county.

When Title VII was amended, effective March 24, 1972, to include state and local government employees within its coverage, all four plaintiffs had been employed as female guards at the jail for periods varying from six months to four and a half years. (Appendix to Petition for Certiorari, hereinafter "A", at pp. 58a-59a). The county jail had a men's section on the second floor and a women's section on the third floor; the personnel were likewise segregated by sex. [2/] The men's section was staffed, in 1972, by thirteen deputy sheriffs who were temporarily assigned to jail duty for periods ranging from a few days to a year.

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[2/] After the county created the new positions of "Corrections Officer" and "Corrections Officer Trainee", to replace the deputy sheriffs at the jail in the summer of 1973, the new positions were officially open to both men and women. In practice, however, the new positions were held only by men.

The women's section was staffed by six full-time female guards with two guards generally working each eight-hour shift. (A. 59a.) The district court found that, on the average, there was one guard for every four men prisoners, and three guards for every woman prisoner. (A. 60a.) The duties of the male and female guards were "similar", except that the female guards were responsible for fewer prisoners and were required to perform some clerical work. (A. 59a.)

In December 1972, the county commissioners created the new positions of Corrections Officer and Corrections Officer Trainee to replace the deputy sheriffs at the jail, and to "professionalize" the job of guard. (A. 60a.) The commissioners also approved new salary ranges effective February 1, 1973. Under both the old and new ranges, the lowest male salary was higher than the highest

female salary:

| | Old | New |
|---|---|---|
| Deputy Sheriffs | $668-853 | $736-940 |
| Deputy Sheriff Recruits | 636-736 | 701-812[3/] |
| Corrections Officers | - | 701-896 |
| Corrections Officers Trainees | - | 668-812 |
| Matrons | 476-606 | 525-668 |

The commissioners rejected the sheriff's proposal to increase the female guards' salaries by about 20% over the new salary amount. (A. 61a.)

In June 1973, corrections officers began to replace deputy sheriffs in the men's

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[3/] The new salary range for Deputy Sheriff Recruits listed by the district court and reprinted in Petitioners Appendix to the Petition for Certiorari, $701-812, conflicts with the range listed by the Court of Appeals, $668-812. See Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), pet. for rehearing denied, 623 F.2d 1303, 1308 (1980). Under either schedule, all women are paid less than all men.

section. Shortly after that, plaintiff Gunther asked the union, which represented both female and male guards, to demand the same pay for the female guards as for the new corrections officers. A few days later, a county official informed the female guards that because of overcrowding in the men's section, the county was considering whether to board women prisoners with another county. (A. 62a.)

In November 1973, the union and the county met to review the female guards' demands. A report was prepared shortly after the meeting which stated that the county could save substantial amounts of money per year if it boarded women prisoners outside the county and replaced the female guards with two and a half police stenographers. The commissioners adopted the proposal on December 18, 1973, and terminated the female guards as of January 15, 1974. (A. 63a.)

The district court, relying on the greater amount of clerical work performed by the female guards and the lower number of prisoners guarded by each female guard, found that compared to the male guard job, the female guard job did not require "equal" effort or responsibility. (A. 69a.) The court concluded that the jobs were not "substantially equal," and therefore plaintiffs had failed to make out a prima facie claim under Title VII. (A. 70a.)

On appeal, the Ninth Circuit Court of Appeals reviewed the record, concluded that the district court's findings were supported by the evidence, and agreed that the jobs were not "equal." (A. 30a.) That finding is not challenged here. However, the Ninth Circuit disagreed with the district court's conclusion that a claim could not be made under Title VII if the jobs were not substantially equal, and agreed with the plaintiffs that "they should be allowed to

prove that some of the discrepancy in wages was due to sex discrimination." (A. 31a.) Interpreting the Bennett Amendment to Title VII, [4] the court held that "plaintiffs are not precluded from suing under Title VII to protest other discriminatory compensation practices unless the practices are authorized under one of the four affirmative defenses contained in the Equal Pay Act and incorporated into Title VII by §703(h)." (A. 38a-39a.) Thus, the court concluded that the Bennett Amendment incorporated the Equal Pay Act's four affirmative defenses, but not its equal work standard, into Title VII. In

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[4] The Bennett Amendment, found in §703(h) of Title VII, Civil Rights Act of 1964, see 42 U.S.C. §2000e-2(h), provides in pertinent part as follows:

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

addition, the court concluded that "the broad remedial policy behind Title VII persuades us that Title VII's plain language should not be limited further in the absence of a clear Congressional directive." (A. 36a.) The panel remanded for further proceedings to "afford plaintiffs the opportunity to establish a claim of sexual discrimination apart from an equal pay claim." (A. 49a.)

In a supplemental opinion issued in denial of rehearing, the panel once again reviewed the legislative history of the Bennett Amendment, and again concluded that a wage discrimination claim can be brought under Title VII even if it could not be brought under the Equal Pay Act (A. 18a):

> All we hold here is that a plaintiff is not precluded from establishing sex-based discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible.

The court also expressly stated that it was not substituting a "comparable" work standard for an "equal" work standard, and held that something more than evidence of unequal compensation for "comparable" work would be necessary to establish a prima facie case under Title VII. (Respondents do not challenge that holding.) Observing that the Gunther plaintiffs had apparently presented evidence of intentional discrimination below, and may have been precluded from presenting additional evidence of discrimination, the court remanded for further proceedings in the district court. (A. 18a-19a.)

This court granted certiorari on November 3, 1980, 40 U.S.L.W. 3332 (Nov. 4, 1980).

## SUMMARY OF ARGUMENT

The construction of Title VII urged by Petitioners, that Title VII plaintiffs can establish a prima facie case of discrimination in compensation only if they can show a prima facie violation of the Equal Pay Act, is inconsistent with Congressional intent and with City of Los Angeles Department of Water & Power v. Manhart, 435 U.S. 702 (1978). In Manhart, the Court held that female employees had established a prima facie Title VII compensation claim by showing that the employer withheld more from their paychecks for pension payments than from the paychecks of male employees earning the same salary. The employees did not allege or show that each female employee performed work "substantially equal" to work performed by a male employee. The Court therefore authorized a compensation claim under Title VII that would not have

stated a prima facie case under the Equal Pay Act.

The result in Manhart is consistent with the broad remedial purposes of Title VII, and with the Congressional policy of treating sex discrimination with the same seriousness as discrimination on the basis of race, religion, or national origin. In addition, the very different language and scope of the two statutes demonstrate that Title VII was intended to have broader coverage than the Equal Pay Act, and that Title VII was intended to be a much more comprehensive scheme for prohibiting sex discrimination in employment. Adoption of Petitioners' position would significantly narrow Title VII coverage and would frustrate Congressional intent. (Point I).

Given the broad remedial purposes of Title VII, the Court should not adopt a construction of Title VII that would limit

the ability of women to assert Title VII sex discrimination claims unless a ruling on the proposed limiting construction is necessary in order to resolve a factual situation before the Court. In the circumstances of this case, where Respondents do not contest the burden of showing more than unequal wages for "comparable" work, it is neither necessary nor appropriate for the Court to decide whether proof of unequal wages for comparable work would, without more, establish a prima facie case, or to decide precisely what additional proof would be required to establish a prima facie case under Title VII. (Point II).

## ARGUMENT

### I. THE CONSTRUCTION OF TITLE VII URGED BY PETITIONERS AND REJECTED BY THE COURT BELOW IS INCONSISTENT WITH CONGRESSIONAL INTENT AND WITH CITY OF LOS ANGELES V. MANHART.

### INTRODUCTION

Congress intended Title VII to be broader than the Equal Pay Act. As the legislative history and City of Los Angeles Dept. of Water & Power v. Manhart, 435 U.S. 702 (1978), make clear, women can assert sex discrimination in compensation claims under Title VII they could not assert under the Equal Pay Act. Petitioners' argument that Title VII plaintiffs can establish a prima facie case of discrimination in compensation only if they could show a prima facie violation of the Equal Pay Act is therefore inconsistent with Congressional intent and with Manhart.

A. In Manhart, the Court Authorized A Compensation Claim Under Title VII That Could Not Have Been Brought Under The Equal Pay Act.

In Manhart, the Court held that female employees had established a prima facie compensation claim under Title VII [5] by showing that the government employer withheld 14.84% more from their paychecks for pension payments than from the paychecks of male employees earning the same salary.[6]

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[5] The female employees in Manhart asserted a violation of §703(a)(1) of the Civil Rights Act of 1964, as amended, 42 U.S.C. §2000e-2(a)(1), which provides:

> It shall be an unlawful employment practice for an employer--
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race, color, religion, sex or national origin....

[6] Each employee covered by the pension plan in Manhart was eligible, upon retirement, for a monthly retirement benefit computed as

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The plaintiffs in Manhart had not alleged or proved that the male and female employees performed equal work.[7] Because they did not allege that the jobs performed by women required equal skill, effort and responsibility, and were performed under similar working conditions as the jobs performed by men, the Manhart plaintiffs could not have stated a

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a fraction of his or her salary multiplied by years of service. The monthly benefits for men and women of the same age, seniority and salary were equal. Because the cost of the pension for the average retired female was greater than for the average retired male, based upon longevity, the plan required female employees to make higher monthly contributions. Thus, a female employee took home less pay than a male employee earning the same salary. Id. at 705.

[7] As one commentator has noted, it is probable that the female employees could not have shown that they were performing equal work. See Blumrosen, Wage Discrimination, Job Segregation, and Title VII of the Civil Rights Act of 1964, 12 U. of Mich. J.L. Ref. 397, 483-84 (1979).

claim under the Equal Pay Act.[8/] The Court has therefore authorized a compensation claim under Title VII that could not be brought under the Equal Pay Act. The Court concluded that the compensation differential

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[8/] The Equal Pay Act provides, 29 U.S.C. §206(d), in part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex: Provided, that an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage rate of any employee."

constituted unlawful discrimination under Title VII,[9/] and that the discriminatory practice was not exempted by the Equal Pay Act or any other justification.

In addition to establishing that the Equal Pay Act's prima facie requirements should not be incorporated into Title VII, the Court suggested in Manhart that the Bennett Amendment should be interpreted as incorporating only the four affirmative defenses of the Equal Pay Act into Title VII (Manhart, 435 U.S. at 712 n.23):

> [We] need not decide whether retirement benefits or contributions to benefit plans are 'wages' under the [Equal Pay] Act, because the Bennett Amendment extends the Act's four exceptions to all forms of 'compensation' covered by Title VII.

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[9/] As the Court stated, per Justice Stevens, Manhart, 435 U.S. at 711:

> An employment practice that requires 2,000 individuals to con-

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This view of the Bennett Amendment is exactly the position taken below in Gunther by the Ninth Circuit. Gunther v. County of Washington, 602 F.2d 882 (9th Cir. 1979), pet. for reh. denied, 623 F.2d 1303 (1980). The legislative history[10/] which supports this interpretation of the Bennett Amendment is thoroughly discussed by the Third Circuit in I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (3rd Cir. 1980), pet. for cert. filed November 14, 1980, 49 U.S.L.W. 3410 (Dec. 2, 1980), and by the panel in Gunther.

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> tribute more money into a fund than 10,000 other employees simply because each of them is a woman, rather than a man, is in direct conflict with both the language and the policy of the [Civil Rights] Act.

[10/] See also note 35 infra, supporting the conclusion that the Bennett Amendment incorporates only the Equal Pay Act's four exceptions into Title VII.

B. The Result in Manhart Is Consistent With The Broad Remedial Purposes of Title VII.

Manhart's recognition that Title VII is broader than the Equal Pay Act is consistent with the broad remedial purposes of Title VII, and with the Congressional policy of treating sex discrimination with the same seriousness as discrimination on the basis of race, religion or national origin. See Manhart, 435 U.S. at 709.

The remedial goals of both the race and sex discrimination provisions were strongly reaffirmed by Congress in 1972, when Congress expanded Title VII coverage to include state and local government employees. 11/ In explaining the necessity

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11/ Equal Employment Opportunity Act of 1972, Pub.L. 92-261, §2, 86 Stat. 103, see 42 U.S.C. §2000e(a) and (f). Because the Gunther plaintiffs were included in Title VII coverage only after the 1972 amendments became effective March 24, 1972, the 1972 legislative history is directly relevant to the instant case.

for the 1972 amendments to Title VII, the House Committee on Education and Labor reviewed the grave economic impact of discrimination on women workers by comparing average salaries of women and men:

> Recent statistics released from the U.S. Department of Labor indicate that there exists a profound economic discrimination against women workers. Ten years ago, women made 60.8% of the average salaries made by men in the same year....Similarly, in that same year, 60% of women, but only 20% of men earned less than $5,000. At the other end of the scale, only 3% of women, but 28% of men had earnings of $10,000 or more. 12/

The Committee then noted that those substantial economic disparities are the result of discrimination against women as a class. Id.:

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12/ H.R. Rep. No. 92-238, 92d Cong., 2d Sess. (1971)[To accompany H.R. 1746], reprinted in 1972 U.S. Code Cong. & Ad. News 2140.

> Women are subject to economic deprivation as a class. Their self-fulfillment and development is frustrated because of their sex. Numerous studies have shown that women are placed in the less challenging, the less responsible and the less remunerative positions on the basis of their sex alone.

Despite efforts of the courts and EEOC since 1964, [13/] the Committee observed that "discrimination against women continues

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13/ The legislative history of Title VII of the Civil Rights Act of 1964 also supports the conclusion that Congress intended to treat the inclusion of sex discrimination with the same seriousness as discrimination on the basis of race, religion, or national origin. Although the legislative history of the sex discrimination provision of the 1964 Act has been described as "notable primarily for its brevity", see General Electric Co. v. Gilbert, 429 U.S. 125, 143 (1976); but see Berger, Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women, 5 Val. U.L. Rev. 326, 330-37 (1971), the amendment adding sex discrimination to the other discriminations prohibited by Title VII received strong support in the House debates from four Congresswomen, and also from several Congressmen, who urged its adoption to assure full employment rights for both

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to be widespread, and is regarded by many as either morally or physiologically justifiable." Id. at 2141. The Committee then specifically rejected the notion that sex discrimination is less serious than other forms of employment discrimination. Id.:

> This Committee believes that women's rights are not judicial divertissements. Discrimination against women is no less serious than other forms of prohibited employment practices and is to be accorded the same degree of social concern given to any type of unlawful discrimination. (emphasis added).

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minority and white women, and to supercede discriminatory state "restrictive" laws which had long been used as an excuse for discrimination against women by both employers and labor unions. See Congressional Record, 88th Cong., 2d Sess., 110 Cong. Rec. 2577-84 (1964); see generally Gitt & Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy. U.L.J. 723, 742-49 (1977); Berger, supra at 330-37.

Congress recognized in 1972 that discrimination is more subtle and complex than had been imagined in 1964, and therefore described the problem in terms of "systems" and "effects" rather than simply "intentional wrongs." S. Rep. No. 92-415, 92d Cong., 1st Sess. 5 (1971). 14/ Thus, in 1972, Congress reaffirmed its basic commitment, first announced in 1964, to prohibit

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14/ The Senate Committee on Labor and Public Welfare, in addressing the need for stronger EEOC enforcement powers, stated the following:

> In 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, for the most part due to ill-will on the part of some identifiable individual or organization. Employment discrimination as viewed today is a far more complex and pervasive phenomenon. Experts familiar with the subject now generally describe the problem in terms of "systems" and "effects" rather than simply intentional wrongs, and the literature on the subject is replete with discussions of, for example, the mechanics of seniority and lines of progression, perpetuation of the present effect of pre-act discriminatory practices through various institutional devices, and testing

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sex-based employment discrimination in all its forms.

Even without reference to the legislative history, a comparison of the language of Title VII [15] with that of the Equal Pay Act [16] sharply outlines the difference in scope between the two statutes, and shows

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and validation requirements. [Footnote omitted.] S. Rep. No. 92-415 at 5. Accord, H.R. Rep. No. 92-238, 92d Cong., 2d Sess. (1971), reprinted in 1972 U.S. Code Cong. & Ad. News, 2143-44.

15/ See §703 of the Civil Rights Act of 1964, Pub. L. 88-352, 78 Stat. 255, 42 U.S.C. §2000e-2(a).

16/ See §6(d)(1) of the Fair Labor Standards Act of 1938, as added by the Equal Pay Act of 1963, 77 Stat. 56, 29 U.S.C. §206(d)(1).

that Congress obviously intended Title VII to have much broader coverage than the Equal Pay Act, which had been enacted only a year earlier. In broad, comprehensive language, Section 703(a) of Title VII [17] provides that it shall be an unlawful employment practice for an employer either

> 1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin;
>
> or
>
> 2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

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[17] 42 U.S.C. §2000e-2(a).

Title VII prohibits sex discrimination not only with respect to "compensation" and "classification," but also in hiring, assignment, promotion, and discharge. Thus, a broad range of discriminatory practices may be challenged under Title VII.

In contrast, the Equal Pay Act's prohibition of sex discrimination applies only in one narrowly-defined situation (29 U.S.C. §206(d)(1)):

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions....

The focus of the Equal Pay Act, in compari-

son to Title VII, is on "wages" or "pay"[18] rather than "compensation" and "classification". Under the Equal Pay Act, a prima facie case can be established only if the following factors are present: 1) the jobs being compared are within the same "establishment"; 2) the discrimination concerns pay; 3) the jobs involve substantially equal work; [19] 4) performance of the jobs require substantially equal skill; 5) substantially equal effort; and 6) substantially equal responsibility; and 7) the jobs are performed under similar working conditions.

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[18] See 29 C.F.R. §800.110. The regulations define "wages" paid to an employee as "all payments made to or on behalf of the employee as remuneration for employment," including the fair value of non-cash items such as room and board, 29 C.F.R. §800.112, but not including bona fide gifts or certain discretionary bonuses, 29 C.F.R. §800.113. See generally 29 C.F.R. §§800.110-800.116.

[19] The jobs need not be "identical," but only "substantially equal." See Corning Glass Works v. Brennan, 417 U.S. 188, 203 n.24 (1974); Shultz v. Wheaton Glass Co., 421 F.2d 259, 265 (3d Cir. 1970), cert. denied, 398 U.S. 905 (1970).

Not one of these prima facie case requirements is specified in Section 703 (a) of Title VII. If Congress had intended to limit sex discrimination compensation cases to the narrow factual setting covered by the Equal Pay Act, surely Congress would have done so with specific statutory language making it clear that such a substantive limitation on the prima facie case was intended.

Apart from the narrow scope of the Equal Pay Act, there are additional substantive and procedural limitations on suits brought under the Equal Pay Act that do not limit suits under Title VII. The employee coverage of the Equal Pay Act, for example, derives from the coverage of the minimum wage law, [20/] which

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20/See 29 U.S.C. §206(a). The coverage of the Equal Pay Act differs from the minimum wage law in only two respects. First, all executive, administrative, and professional employees exempted from minimum wage coverage are covered by the Equal Pay Act. 29 U.S.C. §213(a)(1). Second, labor organizations which are not included in the minimum

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applies to any "establishment" of an "enterprise" engaged in interstate commerce. [21/] Specific statutory exemptions, however, deny protection to certain groups of employees, including:

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(footnote cont'd from previous page) wage law, 29 U.S.C. §203(d), are prohibited in the Equal Pay Act from causing an employer to violate the Act. 29 U.S.C. §§206(d)(2), 206(d)(4).

21/29 U.S.C. §§206(d)(1), 206(a). 29 C.F.R. §800.108. Compare Brennan v. Goose Creek Consol. Independent School Dist., 519 F.2d 53 (5th Cir. 1975)(school district, not each separate school, is the "establishment"), with Wetzel v. Liberty Mutual, 449 F.Supp. 397 (W.D. Pa. 1978) aff'd in part, vac'd in part, 508 F.2d 239 (3d Cir. 1975), cert. denied, 421 U.S. 1011 (1975)(each separate branch office, not the overall company, is the establishment).

A recent federal district court decision has erroneously interpreted the Bennett Amendment to Title VII, §703(h), 42 U.S.C. §2000e-2(h), to require a plaintiff bringing a Title VII equal pay claim to show that the jobs are within the same "establishment." See Davis v. Western Elec. Co., 24 F.E.P. Cases 65 (M.D.N.C. July 6, 1979). Thus, if Petitioners' argument regarding the meaning of the Bennett Amendment is adopted by the Court, the single establishment element required to make out a prima facie Equal Pay Act claim would also be incorporated into Title VII, further limiting Title VII sex discrimination coverage.

1) employees who work for amusement or recreational establishments which are in operation during fewer than eight months per year; [22] 2) employees in the fish industry who catch, cultivate, process, can, or pack fish; [23] 3) certain employees of agricultural farms; [24] 4) employees of small newspaper publishers whose regular circulation is less than four thousand papers; [25] and 5) employees who work as switchboard operators for small, independently owned public telephone companies.[26]

Title VII, on the other hand, applies to all employers engaged in interstate commerce who have fifteen or more employees,[27]

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22/29 U.S.C. §213(a)(3).

23/29 U.S.C. §213(a)(5).

24/29 U.S.C. §213(a)(6).

25/29 U.S.C. §213(a)(8).

26/29 U.S.C. §213(a)(10).

27/42 U.S.C. §2000e(b).

without the specific exemptions of the Equal Pay Act. 28/ And Title VII, unlike the Equal Pay Act, covers discriminatory practices of labor unions 29/ and employment agencies. 30/

Another difference in employee coverage between the two statutes existed from 1972 to 1974, when Title VII prohibited sex discrimination by state and local governmental employers, 31/ but the Equal Pay Act

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28/Like the Equal Pay Act, however, Title VII exempts elected public officials from employee coverage. Compare 42 U.S.C. §2000e(f) with 29 U.S.C. §203(e)(2)(C).

29/42 U.S.C. §2000e-2(c). See note 20, supra. Although the Equal Pay Act prohibits unions from causing an employer to violate the Act, an employee does not have a private right of action against a union under the Equal Pay Act. Tuma v. American Can Co., 367 F.Supp. 1178, 1181 (D.N.J. 1973). Only the government may bring an action against the union under the Equal Pay Act.

30/42 U.S.C. §2000e-2(b).

31/Title VII was amended, effective March 24, 1972, to include state and local government employees within its coverage. Equal Employment Opportunity Act of 1972, Pub.L. 92-261, 86 Stat. 103, see 42 U.S.C. §2000e(a) and (f).

did not. [32] The Gunther plaintiffs themselves, therefore, were precluded from bringing suit under the Equal Pay Act. Since 1974, state and local government employees have been able to sue under both Title VII and the Equal Pay Act. [33]

A major procedural difference between Title VII and the Equal Pay Act also limits

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32/The Fair Labor Standards Act was amended, effective May 1, 1974, to include state and local governments in the statutory definition of "employer." Fair Labor Standards Amendments of 1974, Pub.L. 93-259, 88 Stat. 55, April 8, 1974, see 29 U.S.C. §203(d). Although the Equal Pay Act covered governmental employers in July 1974, when the Gunther plaintiffs sued, it did not cover governmental employers prior to January 15, 1974, when the jobs held by the Gunther plaintiffs were terminated.

33/Because the reasoning of National League of Cities v. Usery, 426 U.S. 833 (1976) (application of the minimum wage law to state and local government employees held unconstitutional) does not apply to the Equal Pay Act, courts have uniformly held that the Equal Pay Act continues to protect state and local government employees. E.g., Marshall v. A&M Consol. Independent School Dist., 605 F.2d 186 (5th Cir. 1979); Pearce v. Wichita County, 590 F.2d 128 (5th Cir. 1979); Marshall v. Kent State

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the Equal Pay Act as an effective means of challenging widespread wage discrimination practices. Under the Equal Pay Act, Rule 23 class action suits on behalf of unnamed employees are not permitted. Instead, all employees must be among the named plaintiffs who initially file suit, or shortly thereafter must file written consents with the court, agreeing to be a party.[34/] No such restriction on Rule 23 class actions applies to Title VII claims.

In summary, the very different language and scope of the two statutes demonstrates, even without regard to the legislative history, that Title VII was intended to

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State Univ., 589 F.2d 255 (6th Cir. 1978); Marshall v. Owensboro-Daviess County Hosp. 581 F.2d 116 (6th Cir. 1978); Usery v. Charleston County School Dist., 558 F.2d 1169 (4th Cir. 1977); Usery v. Allegheny County Inst. Dist., 544 F.2d 148 (3d Cir. 1976), cert. denied, 430 U.S. 946 (1977).

34/See 29 U.S.C. §216(b)and (c). See, e.g., Kinney Shoe Corp. v. Vorhes, 564 F.2d 859 (9th Cir. 1977); Schmidt v. Fuller Brush Co., 527 F.2d 532 (8th Cir. 1975). Cf. Oscar Mayer & Co. v. Evans, 441 U.S. 750, 758 n.6 (1979).

have broader coverage than the Equal Pay Act, and that Title VII was intended to be a much more comprehensive scheme for prohibiting discrimination in employment.

### C. Adoption of Petitioners' Position Would Narrow The Coverage of Title VII and Would Frustrate Congressional Intent.

Adoption of Petitioners' argument that Title VII plaintiffs can establish a prima facie case of discrimination in compensation only if they can show a prima facie violation of the Equal Pay Act would significantly narrow Title VII coverage, and in many cases would unnecessarily complicate the proof required to assert a Title VII claim.

In Manhart-type cases, for example, female plaintiffs within each salary level could arguably be required to show that they perform work "equal" to that performed

by men. [35] Comparison of salary classifications might no longer be sufficient. If a group of female employees (for example, female secretarial employees) had

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35/The equal work requirement would not be applicable to Gilbert-type pregnancy disability payments cases because of the specific reference to §703(h) in the 1978 Pregnancy Discrimination Act amendment to Title VII, Pub.L. 95-555, 92 Stat. 2076, Oct. 31, 1978, 42 U.S.C. §2000e(k), which provides in part as follows:

> [W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work, and nothing in section 2000e-2(h) of this title shall be interpreted to permit otherwise. (emphasis added)

The disclaimer was thought necessary because of the Court's reliance in part on the Bennett Amendment in General Elec. Co. v. Gilbert, 429 U.S. 125 (1976), and an Equal Pay Act regulation which provided that certain gender-based differentiations in fringe benefits did not constitute a pay differential under the Equal Pay Act. H.R. Rep. No. 95-948, 95th Cong., 2d Sess. (1978), reprinted in 1978 U.S. Code Cong. & Ad. News 4749, 4755. As the

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no male analog (i.e., there are no men in the same "establishment" who perform

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Senate Committee stated,

> The Supreme Court seems to believe, despite apparently contradictory Equal Pay Act regulations, that the discrimination in question in Gilbert would be authorized by the Equal Pay Act. See 29 C.F.R. 800.151. It is the committee's opinion that any application of the Bennett amendment which assumes that that provision insulates from title VII all compensation and fringe benefit programs which do not also violate the Equal Pay Act, is not correct; by expressly precluding reliance on section 703(h) in this context, therefore, the committee merely intends to insure that employers may not rely on the Equal Pay Act to prevent the correction of pregnancy discrimination under title VII.

S. Rep. No. 95-331, 95th Cong., 1st Sess. (1977), at 7, reprinted in Legislative History of the Pregnancy Discrimination Act of 1978, at 44 (1980) (prepared for Sen. Comm. on Labor and Human Resources).

In discussing the Bennett Amendment, neither committee assumes that the Bennett Amendment requires that equal work must be shown in order to bring a Title VII

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secretarial work),[36] they might be precluded from making a Title VII compensa-

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compensation claim. The Senate Committee does assume, however, that the Bennett Amendment incorporates only the Equal Pay Act's four exceptions into Title VII, id.:

> [T]he Bennett amendment...provides that if a practice is authorized by the Equal Pay Act, 29 U.S.C. §206(d) - that is, if it is within one of the four enumerated exceptions to the Equal Pay Act - then it is not unlawful under title VII.

It would be an anomalous result to allow a pregnancy fringe-benefit claim to be brought without a requirement of showing equal work, but to disallow a similar pension claim brought by the same plaintiffs.

[36] 99.1% of all secretaries in the nation are women. See U.S. Dept. of Labor, Employment Standards Administration, Women's Bureau, 1975 Handbook on Women Workers, p. 90.

tion claim. On the other hand, women employees in jobs which were also performed by men (for example, payroll and timekeeping clerks) [37] would be able to claim a Title VII violation based upon the greater amount deducted from their paychecks due to sex-determined pension payments. Thus, under Petitioners' argument, a Manhart-type employer would have two classes of women employees: 1) women who could make out a Title VII claim because of a male analog in their job classification, and 2) women who could not make out a Title VII claim because there were no men performing a substantially "equal" job. Such an anomalous interpretation of Title VII would frustrate the remedial purposes of Title VII, and should be rejected. In addition, it would clearly contravene legislative intent for this Court to treat Title VII

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37/ 72.2% of all payroll and timekeeping clerks are women. Id.

sex-based wage discrimination claims differently from race or other forms of employment discrimination. 38/

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38/ As the Court stated in Manhart, 435 U.S. at 709:

> But the question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful. Actuarial studies could unquestionably identify differences in life expectancy based on race or national origin, as well as sex. But a statute that was designed to make race irrelevant in the employment market, see Griggs v. Duke Power Co., 401 U.S. 424, 436, 28 L.Ed. 2d 158, 91 S.Ct. 849, could not reasonably be construed to permit a take-home-pay differential based on a racial classification. (footnotes omitted).

Under Petitioners' argument, women could not sue under Title VII for discrimination in compensation unless they performed jobs substantially equal to jobs performed by men under the standards of the Equal Pay Act. Black employees, however, would be able to sue for the same compensation discrimination under Title VII whether or not a white employee performed substantially equal work. Cf. Quarles v. Philip Morris, Inc., 279 F.Supp.

In summary, the Bennett Amendment cannot be construed to limit the ability of women to make out a prima facie Title VII compensation discrimination claim to those narrow instances in which the claim could be made under the Equal Pay Act. As the 1972 legislative history shows, Congress was aware of the widespread economic discrimination against women, and specifically reaffirmed its intention that Title VII should serve as a comprehensive prohibition of all forms of sex-based employment discrimination, no matter how pervasive, subtle, or complex. 39/

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505, 509 (E.D. Va. 1968)("casing attendant" job involving flavoring of tobacco, a job always filled by blacks, is compared to basic machine operator job, reserved for whites)

Adoption of Petitioners' position would mean that blacks and other minorities would be able to bring a Title VII suit, while a white woman without a male analog would not be able to sue for the same discriminatory compensation practice.

39/See generally, Gitt & Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy.U.L.J. 723 (1977).

## II. IN THE CIRCUMSTANCES OF THIS CASE, IT IS NEITHER NECESSARY NOR APPROPRIATE FOR THE COURT TO DECIDE WHETHER PROOF OF UNEQUAL WAGES FOR "COMPARABLE" WORK IS, WITHOUT MORE, SUFFICIENT TO ESTABLISH A PRIMA FACIE CASE UNDER TITLE VII.

Given the broad remedial purposes of Title VII, this Court should not adopt a construction of Title VII that would limit the ability of women to assert Title VII sex discrimination claims unless a ruling on the proposed limiting construction is necessary in order to resolve a factual situation presently before the Court.[40] Here, the Court of Appeals has held that Respondents must show something more than

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40/ Social or remedial legislation should be construed and applied to fulfill the underlying purposes which Congress sought to achieve. See United Steelworkers of America v. Weber, 443 U.S. 193, 201-04 (1979); Albemarle Paper Co. v. Moody, 422 U.S. 405, 421-22 (1975); see also Gomez v. Toledo, 64 L.Ed.2d 572, 576-77 (1980) (§1983); Monell v. New York City Dep't of Social Services, 436 U.S. 658 (1978)(§1983); Corning Glass Works v. Brennan, 417 U.S. 188 (1974)(Equal Pay Act).

unequal wages for "comparable" work in order to establish a prima facie case.[41/] Because Respondents do not contest assumption of that burden, it is neither necessary nor appropriate for this Court to decide whether proof of unequal wages for comparable work would, without more, establish a prima facie case, or to decide precisely what additional proof would be required to establish a prima facie case.

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41/ Gunther v. County of Washington, 623 F.2d 1303, 1321 (9th Cir. 1980). Comparability of jobs may be shown through use of job evaluation techniques, widely applied since the 1930's, which evaluate the general categories of skill, responsibility, and effort required, and the working conditions under which the job is performed. See generally, Gitt & Gelb, Beyond the Equal Pay Act: Expanding Wage Differential Protections Under Title VII, 8 Loy.U.L.J. 723, 734- 40 (1977). These are the same techniques which have been used in Equal Pay Act cases to quantify work content where the jobs are alleged to be substantially equal. See Corning Glass Works v. Brennan, 417 U.S. 188, 199-201(1974); Shultz v. Hayes Indust., Inc., Civil No. 68-4 (N.D. Ohio

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The Court of Appeals quite narrowly decided that Title VII may support a theory of sex-based wage discrimination that could not be brought under the Equal Pay Act. The Court declined to decide what theories under Title VII could establish a sex-based wage discrimination claim, stating only that something more than evidence of unequal wages for comparable work would be

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April 14, 1970)(expert testimony of job analyst used to prove violation of Equal Pay Act); see generally Murphy, Female Wage Discrimination: A Study of the Equal Pay Act 1963-1970, 39 U.Cin. L.Rev. 615, 634-37 (1970). A violation of the Equal Pay Act may be established even if job titles are different and the official job descriptions specify different duties. Courts look to actual job performance. See Katz v. School Dist. of Clayton, 557 F.2d 153, 156 (8th Cir. 1977)(teacher assistant and teacher); Laffey v. Northwest Airlines, Inc., 567 F.2d 429 (D.C. Cir. 1976), cert. denied, 434 U.S. 1086 (1978)(stewardess and purser); Peltier v. City of Fargo, 533 F.2d 374 (8th Cir. 1976)(car marker and police officer); DiSalvo

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required to establish a prima facie case. Gunther v. County of Washington, 623 F.2d 1303, 1321 (1980).

The Respondents have not challenged the Ninth Circuit's holding in this regard.

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v. Chamber of Commerce of Greater Kansas City, 568 F.2d 593 (8th Cir. 1978), aff'g 416 F.Supp. 844 (W.D. Mo. 1976)(associate editor and communications specialist).

Such job evaluation techniques have also commonly been used to evaluate "comparable" jobs across different job lines. The states of Washington and Michigan, for example, have utilized such techniques to assess the extent to which sex-segregated jobs have resulted in unequal compensation for comparable jobs. See Office of Women and Work and the Michigan Employment Security Commission, Occupational Analysis Field Center, Research and Statistics Division, A Comparable Worth Study of State of Michigan Job Classifications (n.d.); N.D. Willis and Associates, State of Washington Comparable Worth Study (1974). Indeed, employers have themselves utilized such job evaluation systems to assign equal point ratings to comparable jobs. See, e.g., I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094, 1097 (3rd Cir. 1980), pet. for cert. filed, November 14, 1980, 49 U.S.L.W. 3410 (Dec. 2, 1980).

To the contrary, they attempted to present additional evidence in order to establish their prima facie case. As noted by the Ninth Circuit, id.,

> The Gunther plaintiffs apparently presented evidence of intentional discrimination that was not considered by the district court because the district court believed that disposition of the equal pay claims was the end of the inquiry. It is unclear from the record whether the plaintiffs were prevented from presenting other evidence that might have established a claim of sex discrimination.

The court committed to the district court's discretion the extent of further proceedings necessary to consider plaintiffs' additional evidence of discrimination. Id. Thus, the Ninth Circuit ruled only that various theories of sex-based wage discrimination are permissible under Title VII,[42/] and that

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42/ The Court of Appeals in Gunther posited two examples of harmful discriminatory compensation practices not covered under the

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proof of unequal wages for comparable work is a sufficiently suspicious circumstance to warrant further judicial inquiry to determine whether the pay disparity is innocent or the result of sex discrimination.

Given the Ninth Circuit's narrow holding and the willingness of the Respondents to assume the burden of showing more than unequal wages for "comparable" work,[43/] it

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Equal Pay Act: 1) an employer tells a female worker, employed at a position where she has no male counterpart, that she would receive $30 a week more if she were male; and 2) an employer decreases the wages of women employed in a type of job that is held primarily by women and is comparable, but not substantially equal to that performed by men, solely because of their sex. Gunther v. County of Washington, 602 F.2d 882, 890 n.9 (9th Cir. 1979).

43/ In the instant case, Respondents assert they can prove intentional discrimination or wage disparities which are attributable only to the sex of the worker.

is inappropriate for this Court, at this time, to decide whether proof of unequal wages for "comparable" work is, without more, sufficient to establish a prima facie case under Title VII.

A recent Third Circuit decision provides one example of what more could be shown to prove that pay disparity in comparable jobs results from sex discrimination. In I.U.E. v. Westinghouse Electric Corp., 631 F.2d 1094 (3d Cir. 1980), pet. for cert. filed November 14, 1980, 49 U.S. L.W. 3410 (Dec. 2, 1980), the plaintiffs alleged that in the 1930's, the employer analyzed and assigned points to each job on the basis of a gender-neutral job rating system and then deliberately set lower wage rates for jobs occupied by women than for those held by men, even though the "male" and "female" jobs were rated equally. The point ratings were based on the employer's evaluation of the knowledge and training

required, and the specific demands and responsibilities of the jobs. The plaintiffs alleged that when the male and female wage scales were unified in 1965, the new wage scale embodied the deliberately discriminatory policy of the prior plan. The Third Circuit concluded that even though the alleged facts could not support an Equal Pay Act claim because the jobs compared were not substantially "equal," the plaintiffs should be given an opportunity to present their Title VII claim based on intentional sex discrimination.

Although the plaintiffs in both I.U.E. and Gunther alleged "deliberate" or "intentional" wage discrimination against women, it would be inappropriate and unnecessary for this Court to rule that these or other Title VII plaintiffs must always show intent in order to establish a prima facie wage

discrimination case.[44] All the Court

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[44] Requiring "intent" would not sufficiently clarify the proof that is necessary. It is unclear even in constitutional cases, for example, what "intent" means. See generally, Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252 (1977); Washington v. Davis, 426 U.S. 229 (1976). The meaning of "intent" varies in different factual circumstances, and can require different showings depending on whether it is required as a part of the prima facie case or as a defense. Compare Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256, 279 (1979)("discriminatory purpose" implies "more than intent as volition or intent as awareness of consequences") with Wood v. Strickland, 420 U.S. 308, 322 (1975)(good faith defense fails if public official knew "or should have known" that his conduct was unlawful). Furthermore, an interpretation of intent that might be appropriate in the context of constitutional litigation would be quite inappropriate in the context of a remedial statute enacted to end employment discrimination. Cf. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973); Griggs v. Duke Power Co., 401 U.S. 424 (1971). The requisite intent plaintiffs must arguably show in disparate treatment, as opposed to admittedly class-based policies (e.g., Manhart) or disparate impact, cases brought under Title VII is an important question that need not be decided in this case, and should not be decided on the present record. Cf. Burdine v. Texas Dep't of Community Affairs, 608 F.2d 563 (5th Cir. 1979), cert. granted, 65 L.Ed.2d 1112 (1980).

need decide now is that sex discrimination claims involving compensation are not strictly limited to those which could be brought under the Equal Pay Act. Affirmance would not mean that Respondents prevail. It would merely provide Respondents the opportunity to present additional evidence in support of their claim. Only after development of such a factual record on remand would it be appropriate to determine whether the facts establish a prima facie case of Title VII discrimination. Consideration of the possible elements of the prima facie case without such a record[45/] would involve the Court in unnecessary speculation.

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45/ In addition, a ruling requiring intent in all wage compensation claims would be inconsistent with the principle established in Griggs v. Duke Power Co., 401 U.S. 424 (1971). For example, a facially neutral employment policy under which employees

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The Court should refrain from deciding this important question in the abstract. As Justice Frankfurter wrote in his concurring opinion in Joint Anti-Fascist Refugee Committee v. McGrath, 341 U.S. 123, 154-55 (1950), courts do not review issues until they have to:

> In part, this practice reflects the tradition that courts, having final power, can exercise it most wisely by restricting themselves to situations in which decision is necessary. In part, it is founded on the practical wisdom of not coming prematurely or needlessly in conflict with the executive or legislature.

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who are heads-of-households receive wage bonuses would violate Title VII if significantly fewer women or black employees qualified for such a bonus. Furthermore, requiring intent would be inconsistent with the explicit Congressional desire to prohibit discriminatory "systems" and "effects," not "simply intentional wrongs." See note 14, supra.

See also Ashwander v. Tennessee Valley Au-Auth., 297 U.S. 288, 341 (1935)(Brandeis, J., concurring).

This policy of judicial restraint, appropriate in all circumstances, is particularly appropriate here where remedial legislation is involved, where the Respondents do not contest the burden of showing more than unequal wages for comparable work, and where the present factual record does not permit non-speculative resolution of the ultimate proof requirements.

## CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

Dated:

New York, New York
January 28, 1981

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No. 80-429

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,
*Petitioners,*

v.

ALBERTA GUNTHER, VALENE M. VALLANCE, MARION E. VANDER ZANDEN AND YVONNE M. HATTON,
*Respondents.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## MOTION FOR LEAVE TO FILE AND BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL UNION UAW, NATIONAL TREASURY EMPLOYEES UNION, AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES

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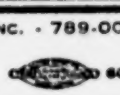
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THE COUNTY OF WASHINGTON AND
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## MOTION FOR LEAVE TO FILE BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL UNION UAW, NATIONAL TREASURY EMPLOYEES UNION, AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES

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The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), et al., move pur-

suant to Rule 36.3 of the Rules of this Court, for leave to file the attached brief *amici curiae* in support of the position of respondents in this case. Consent to the filing of this brief has been declined by the petitioners.

## INTEREST OF THE AMICI CURIAE

The American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) is a federation of 104 national and international labor organizations representing approximately 13,500,000 employees throughout the United States.

The International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC, and its affiliated locals are the collective bargaining representatives for employees at nearly 1,000 companies in electrical equipment and related industries. IUE represents more than 300,000 persons, some 100,000 of whom are women.

The International Union UAW, which represents approximately 1,250,000 employees, is the largest industrial union in this country.

The National Treasury Employees Union (NTEU) represents 125,000 federal employees in a dozen agencies and in many different occupations.

The National Federation of Federal Employees (NFFE) represents 150,000 federal employees, fifty per cent of whom are women.

The labor movement's interest in this case and its efforts to assure equality of employment opportunity for its members is most simply stated by reference to the IUE's extensive program of enforcement of Title VII and other applicable civil rights laws.* A major con-

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* See *Brief Amicus Curiae of International Union of Electrical, Radio and Machine Workers, AFL-CIO, CLC* in *Northwest Airlines, Inc.* v. *Transport Workers Union of America, AFL-CIO*, No. 79-1056.

cern of the IUE enforcement program has been the problems of discrimination against women in compensation. IUE, together with its locals and members, have instituted a number of cases under Title VII alleging that the rates for jobs traditionally performed by women were systematically depressed by the major electrical manufacturers, at a time when their workforces were sex segregated, because of the availability of women workers at low rates, and that the discriminatory "women's rates" were not eliminated at the time that the jobs were desegregated. These cases seek correction of the original intentional discrimination against women as a class. See, *e.g.*, *International Union of Electrical, Radio and Machine Workers* v. *Westinghouse Electric Corp.*, 631 F.2d 1094 (3d Cir. 1980), *petitions for cert. pending*, Nos. 80-944, 80-781. If the position argued by petitioner in this case were sustained in its full breadth it would preclude IUE from challenging these systems under Title VII.

## ISSUE TO BE COVERED

In the attached brief *amici curiae*, we argue that the Bennett Amendment to Section 703(h) of Title VII, 42 U.S.C. § 2000e-2(h), incorporates into Title VII, the basic substantive standard of the Equal Pay Act, 29 U.S.C. § 206(d). This means, we believe, first that claims of sexual discrimination in compensation based solely on comparisons of unequal jobs are excluded from Title VII as they are from the Equal Pay Act; but, second, that the Amendment does *not* exclude from the reach of Title VII other sexually discriminatory compensation practices. This

interpretation, which, in our view, best accords with both the language and relevant legislative history of both acts, is different from that presented by the parties, or, to our knowledge, by any other *amicus curiae.*

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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No. 80-429

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THE COUNTY OF WASHINGTON AND
SHERIFF WARREN BARNES, IN HIS CAPACITY AS
SHERIFF OF WASHINGTON COUNTY,
*Petitioners,*

v.

ALBERTA GUNTHER, VALENE M. VALLANCE,
MARION E. VANDER ZANDEN AND YVONNE M. HATTON,
*Respondents.*

---

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF *AMICI CURIAE* ON BEHALF OF AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS, INTERNATIONAL UNION OF ELECTRICAL, RADIO AND MACHINE WORKERS, AFL-CIO, INTERNATIONAL UNION UAW, NATIONAL TREASURY EMPLOYEES UNION, AND NATIONAL FEDERATION OF FEDERAL EMPLOYEES

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This brief *amici curiae* is filed contingent on the granting of the foregoing motion for leave to file said brief. The interest of the *amici curiae* in this case is set forth in that motion.

## SUMMARY OF ARGUMENT

The question presented in this case does not concern the meaning of the basic prohibitions stated in § 703(a) of the Civil Rights Act of 1964. Rather the question turns on the extent to which the Bennett Amendment included in § 703(h) limits the applicability of those prohibitions to claims of sex discrimination in compensation. Petitioners' contention, in essence, is that normal Title VII principles are inapplicable to such claims and that unless a case can be made out under the Equal Pay Act of 1963 there is no Title VII violation. It is our position that Congress harmonized these two laws by incorporating into Title VII the two basic decisions made in the Equal Pay Act—that unequal pay to women for "equal" work is a *per se* violation subject to four stated defenses and that this strict liability rule does *not* apply to "comparable" work—and, that Congress intended Title VII's general principles to govern other sex discrimination in compensation claims. In the argument that follows, we show that petitioners' contention cannot be squared with the relevant Title VII and Equal Pay Act statutory language and legislative history and that, on balance, the interpretation we suggest accords best with the relevant Congressional materials.

## ARGUMENT

### I

A. Title VII states in general terms a prohibition of discrimination in:

> . . . hire . . . compensation, terms, conditions or privileges of employment because of . . . race, color, religion, sex or national origin, [and of employment practices that] . . . limit, segregate or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any in-

> dividual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex or national origin. [42 U.S.C. § 2000e-2(a).]

Congress' intent in enacting these prohibitions was "to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin . . ., and [Congress] ordained that its policy of outlawing such discrimination should have the 'highest priority'." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976), citing *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36, 47 (1974). See also *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1974); *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405, 421 (1975). To achieve this purpose, Congress "proscribed not only overt discrimination, but also practices that are fair in form, but discriminatory in operation." *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971). In *Teamsters* v. *United States*, 431 U.S. 324, 335-36, n. 15 (1977), this Court described the two basic types of discrimination interdicted, and the applicable standards of proof:

> "Disparate treatment" . . . is the most easily understood type of discrimination. The employer simply treats some people less favorably than others because of their race, color, religion, sex or national origin. Proof of discriminatory motive is critical, although it can in some situations be inferred from the mere fact of differences in treatment . . . Undoubtedly, disparate treatment was the most obvious evil Congress had in mind when it enacted Title VII. . . . Claims of disparate treatment may be distinguished from claims that stress "disparate impact". The latter involve employment practices that are facially neutral in their treatment of different groups but that in fact fall more harshly on one group than another and cannot be justified by business necesisty. . . . Proof of discriminatory motive,

> we have held, is not required under a disparate impact theory. [Citations omitted.]

See also *Dothard* v. *Rawlinson*, 433 U.S. 321, 328-329 (1977).

Unless Congress specified otherwise, under the plain language of the Act as interpreted by the Court, the following practices would appear to be unlawful under Title VII:

> —"an employer tells a female worker, not employed at a position that is substantially equal to that performed by a male, that he would pay her $30 a week more if she was male." *Gunther* v. *County of Washington*, 623 F.2d 1303, 1313 (9th Cir. 1980);
>
> —"an employer pays welders more than plumbers for the reason that 'the majority of welders are men and the majority of plumbers are women.'" *IUE* v. *Westinghouse Elec. Corp.*, 631 F.2d 1094, 1100 (3d Cir. 1980), *petitions for cert. pending*, Nos. 80-781, 80-944;
>
> —"an employer . . . isolate[s] a job category which was traditionally all female [and] arbitrarily cut[s] the wages of that job class for the sole reason that its holders were female . . ." See *IUE* v. *Westinghouse Elec. Corp.*, 19 FEP Cases 450, 457 (D.N.J. 1979), *rev'd*, 631 F.2d 1094, *supra*.

All of the foregoing are examples of "disparate treatment" in setting wages adversely affecting women, accompanied by clear evidence of "discriminatory motive."[1]

---

[1] The "disparate impact" analysis was developed by this Court in the context of facially neutral practices that are used to select from among a group of applicants or employees, see *Griggs* v. *Duke Power Co.*, 401 U.S. at 430-33; *Dothard* v. *Rawlinson*, 433 U.S. at 329; *Albermarle Paper Co.* v. *Moody*, 422 U.S. at 425, and it is an open question whether it applies to non-selection procedures used to determine compensation for a job classification. See *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702, 710-11,

Indeed, these examples appear indistinguishable in principle from *Los Angeles Dept. of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). In that case, "a female employee took home less pay than a male employee earning the same salary" (*id.* at 705) because the employer "required female employees to make monthly contributions to the [pension] fund which were higher than the contributions required of comparable male employees." (*Id.*). The Court held: "Such a practice does not pass the simple test [under Title VII] of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different." *Id.* at 711. And the Court specified that the unequal contribution requirements constituted unlawful discrimination in "compensation" on grounds of sex. *Id.* at 712, n. 23.

These conclusions are entirely unexceptional. Congress spoke in broad language in Title VII. Thus, unless it is otherwise indicated, the general principles stated in the Act certainly apply where the result is within both the letter and spirit of the statute.

Petitioners argue, however, that Congress intended Title VII to make unlawful only those sexually discriminatory compensation practices already unlawful under the Equal Pay Act of 1963, 29 U.S.C. § 206(d). That Act's substantive standard states:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employ-

---

n.20 (1978). If the disparate impact analysis does apply, then compensation practices "neutral in their treatment of different groups that in fact fall more harshly on one group than another and cannot be justified by business necessity" would also appear to be unlawful under the general prohibitions of Title VII.

> ees of the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex; Provided, That an employer who is paying a wage rate differential in violation of this subsection shall not, in order to comply with the provisions of this subsection, reduce the wage of any employee.

In other words, the Equal Pay Act provides that it is unlawful sexual discrimination *per se* for an employer to pay employees of one sex less than employees of the other for doing "equal jobs" within the meaning of the Act, unless one of the four stated exceptions to this prohibition applies.

On petitioners' theory, all of the compensation practices described above, pp. 4-5, would be lawful under Title VII, although none has any connection to the question treated in the Equal Pay Act of the relationship between male and female jobs. In particular, under petitioners' theory, the compensation discrimination found by the Court in *Manhart* would be lawful, at least as to women who are in all-female job classifications.[2] To paraphrase this Court's statement in *Steelworkers* v. *Weber*, 443 U.S. 193, 204 (1979), it would be "ironic indeed if [the Equal Pay Act], a law triggered by the Nation's concern over" compensation discrimination against women, resulted in the exclusion from Title VII of a wide variety of com-

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[2] There was no showing or discussion in *Manhart* as to whether the entire class of women performed "equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions" as did men.

pensation practices that discriminate on grounds of sex, which practices are prohibited by Title VII where they discriminate against other groups protected by that statute.

Congress did, to be sure, take account of the Equal Pay Act in its deliberations on Title VII and did indicate an intent to harmonize the two laws. But, Congress did not intend to approve all discriminatory pay practices not covered by the very narrow prohibitions contained in the Equal Pay Act. While the legislative materials do not specify the exact relationship of Title VII and the Equal Pay Act in the clearest possible terms, those materials do demonstrate that petitioners' position is untenable.

B. The only guidance in the language or legislative history of Title VII as to the intended relationship of that Act and the Equal Pay Act is the following:

First, Senator Clark, Senate floor manager of the fair employment provisions of the 1964 bill, prepared written responses to certain "objections" that had been made to the legislation and entered these in the record. The objection referring to the Equal Pay Act and Senator Clark's response thereto are as follows:

> Objection. The sex antidiscrimination provisions of the bill duplicate the coverage of the Equal Pay Act of 1963. But more than this, they extend far beyond the scope and coverage of the Equal Pay Act. They do not include the limitation in that act with respect to equal work on jobs requiring equal skills in the same establishments, and thus, cut across different jobs.
>
> Answer: The Equal Pay Act is a part of the wage hour law, with different coverage and with numerous exemptions unlike Title VII. Furthermore, under Title VII, jobs can no longer be classified as to sex, except where there is a rational basis for dis-

> crimination on the ground of bona fide occupational qualification. The standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII. [110 Cong. Rec. 7217 (1964).]

Second, on June 16, 1974, after the Mansfield-Dirksen bill had been adopted as a substitute for the bill passed by the House, and after cloture had been invoked, Senator Bennett offered an amendment that resulted in the addition of the following language as the second sentence of § 703(h):

> It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d)). [42 U.S.C. § 2000e-2(h).]

The discussion of the Bennett Amendment from its introduction to its adoption consumed only a few moments. The entire colloquy is as follows:

> Mr. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word "sex" has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word "sex" in the bill and in the Equal Pay Act.

> The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.
>
> I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand[ing], I shall ask that the amendment be voted on without asking for the yeas and nays.
>
> Mr. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
>
> Mr. DIRKSEN. Mr. President, I yield myself 1 minute.
>
> We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions.
>
> All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
>
> Therefore, this amendment is necessary, in the interest of clarification. [110 Cong. Rec. 13647 (1964).]

The amendment was then adopted. *Id.*[3]

Third, when the Civil Rights Bill, as amended in the Senate, was returned to the House, Judiciary Committee Chairman Celler, the sponsor of the original House bill, made a brief statement setting out the major Senate actions and stated therein:

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[3] The only other discussion of the Bennett Amendment in the Senate debate on the 1964 Act is a colloquy between Senators Humphrey and Randolph set out in this Court's opinion in *Los Angeles Dept. of Water* v. *Manhart*, 435 U.S. at 714, n.25. This colloquy sheds no light on the issue in this case. See also the Court's discussion of the colloquy in *Manhart*, 435 U.S. at 714-15.

> The Senate amendment [to the House bill] also . . . provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—Section 703[(h)]. [110 Cong. Rec. 15896 (1964).] [4]

---

[4] One year after Title VII had been enacted into law Senator Bennett expanded on the original explanation of his amendment quoted above in a statement on which petitioner places great weight:

> Mr. BENNETT. Mr. President, we have just finished our work on the voting bill which again involved a decision by the Senate to invoke cloture. Fortunately, there were comparatively few amendments to be voted on, after cloture, and they could be handled in an orderly manner. The fact that they were, reminded me of the completely different situation that prevailed when the Senate a year ago was voting, after cloture, on amendments to the civil rights bill.
>
> On 2 days, June 16 and 17, 1964, there were 56 rollcall votes on amendments which were properly before the Senate. Those 56 votes proceeded in an atmosphere of complete chaos because most of the Senators offering amendments had already used up so much of their allotted hour of debate that there was barely time available to call up many of the amendments and no time to discuss them. This resulted in action by the Senate without the creation of any legislative history. Thus, the Senate failed in its responsibility to give sufficient guidance to those in the executive branch and elsewhere to those who must intepret and apply the amendments adopted.
>
> As an example of what has occurred because of the confusion and near chaos that prevailed on those days, I find myself today under the necessity of trying to create legislative history that should have been created then.
>
> I offered an amendment to the Civil Rights Act of 1964 before cloture was invoked, but when I called up my amendment after cloture the Senate was driving toward final passage of the bill. Though my amendment was acceptable both to the Senator in charge of the bill, the then Senator from Minnesota, and to the minority leader, I was urged by these gentlemen not to take any time to explain the amendment. I followed their recommendations, the amendment was adopted, and now my purpose is being questioned.

[4] [Continued]

That part of the bill represented by my amendment was the subject of a law review article which questioned the intent of the amendment.

* * * * *

Now I find myself, nearly a year later, with the responsibility of clearing up the confusion thus inadvertently created.

In order to do that, Mr. President, I ask unanimous consent to have printed in the RECORD both the appropriate excerpt from the law review article, which raises the question, and a brief prepared by my staff which contains an explanation that should have been made last June.

There being no objection, the excerpt and brief were ordered to be printed in the RECORD, as follows:

* * * * *

RELATION OF TITLE VII TO THE EQUAL PAY ACT: AN EXPLANATION OF THE BENNETT AMENDMENT

Section 703(h) of the Civil Rights Act of 1964 states: "It shall not be an unlawful employment practice under this title for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of action 6(d) of the Fair Labor Standards Act of 1938, as amended (29 U.S.C. 206(d))."

The amendment speaks in terms of a differentiation * * * authorized by the provisions of Section 6(d) of the Fair Labor Standards Act."

Section 6(d) authorizes two things:

1. Wage differentials as between exempt male and female employees doing the same work; and

2. Wage differentials on equal jobs made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex.

The amendment therefore means that it is not an unlawful employment practice: (a) to differentiate on the basis of sex in determining the compensation of white collar and other employees who are exempt under the provisions of the Fair Labor Standards Act; or (b) to have different standards of compensation for nonexempt employees, where such differen-

[4] [Continued]

tiation is not prohibited by the equal pay amendment to the Fair Labor Standards Act.

Simply stated, the amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act. [111 Cong. Rec. 13359 (1965).]

Following the introduction of these materials, Senator Bennett introduced an amendment to the Senate rules governing cloture. The following colloquy then occurred between Senator Bennett and Senator Dirksen:

Mr. DIRKSEN. Mr. President, without commenting on the proposal to modify rule XXII, I am somewhat surprised that the question arose with respect to the amendment.

First, it was carefully examined by me, and also by my staff, whom I deem to be competent and quite schooled in the entire 1964 Civil Rights Act.

Second, it was submitted and carefully examined by the then Senator from Minnesota and now the Vice President of the United States. We accepted it as indicated, on the basis of the intent which was in the mind of the Senator from Utah when he submitted the amendment.

I trust that will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted.

Of course, we were under great pressure at the time to try to complete action on the bill and to get it over to the other body.

I hope that the Senator from Utah will understand why we showed what might be regarded as unseemly haste, but at the time I thought it had to be done.

However, let me emphasize and pinpoint the fact that we had in mind precisely the point made by the Senator from Utah when the amendment was submitted, and I believe that the language speaks for itself.

Mr. BENNETT. Mr. President, my intention is represented by the statement I have inserted again in the RECORD today.

I thank the minority leader for giving me this opportunity to try to straighten out the situation, even if it is 1 year late. [111 Cong. Rec. 13359 (1965).]

Thus, Congress paid only fleeting attention to the problem presented here. Given the intensity of the controversy surrounding Title VII and the length of the debate, the startling point is how little was said on this subject. The limited materials that are available do however establish that Congress understood that Title VII not only covered the same ground as the Equal Pay Act but went far beyond the earlier legislation and that Congress intended that enforcement of the two Acts be harmonized. The Bennett Amendemnt was plainly intended to incorporate into Title VII something of the decisions made in the Equal Pay Act. However, as to particulars, the language of the Bennett Amendment is open to more than one reading. And the meaning of the accompanying explanatory statements is frequently opaque and those statements conflict with each other. Before drawing any more specific conclusions as to the question posed here, it is therefore necessary to consult the legislative history of the Equal Pay Act to determine the nature of the decisions made during consideration of that legislation.

C. The equal pay bill introduced in 1961 by the Kennedy Administration proposed to make it unlawful *per se* for an employer in commerce to discriminate between employees on the basis of sex "by paying wages to any employee at a rate less than the rate at which he pays wages to any employee of the opposite sex for work of comparable character on jobs the performance of which requires comparable skills." H.R. 8898, 87th Cong., 1st Sess. (1961); H.R. 10226, 87th Cong., 2d Sess. (1962). The only exception to this requirement was for payments "made pursuant to a seniority or merit increase system which does not discriminate on the basis of sex." *Id.*

The legislative history leading ultimately to the enactment of the Equal Pay Act of 1963 demonstrates that Congress' principal concern with respect to the substantive reach of this proposal was with the desirability of

predicating strict liability on debatable conclusions as to the "comparability" of widely differing jobs held by men and women. This concern ultimately led to the enactment of an equal pay requirement only as between "equal" jobs. The debate on the substance of the Equal Pay Act was conducted within the limits just stated. The proponents did not seek to prohibit any discriminatory compensation practice other than the denial of equal pay for "comparable" work; the opponents did not raise other issues and the Congress did not consider, much less authorize, any other such practice.

**1. The 1962 Hearings and Debates.**

From the outset, the element which attracted the most concern and debate in the Congress was the proposal to require equal pay for "comparable" rather than "equal" work. Proponents of the legislation, such as Secretary of Labor Arthur Goldberg, testified that the comparability of different jobs could be determined through the use of recognized job evaluation procedures.[5] Opponents ar-

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[5] I have had 25 years of experience representing the labor movement in negotiating labor contracts where the question of comparable work is an accepted concept not only with relation to women, but with relation to men. Job evaluation is a technique, a scientific technique, widespread throughout American industry, and hundreds of thousands and millions of jobs in American industry today are classified under job classification systems and compensation is paid on the bases of job evaluation systems which are predicated upon evaluation factors of which comparability of work is significantly one.

Hearings on H.R. 8898, H.R. 10226 Before the Select Subcommittee On Labor of the House Committee on Labor, 87th Cong., 2d Sess. 16 (1962) (hereafter cited as "1962 Housing Hearings . . ."). See also, *id.* at 12. The Secretary's arguments were supported by Assistant Secretary of Labor Esther Peterson, who described the job evaluation procedures used in industry to determine the value of jobs, 1962 House Hearings at 27; see also *id.* at 216, and by union representatives who testified in support of the bill. See 1962

gued that it was neither possible nor desirable to compare the worth of substantially different jobs.[6]

On May 17, 1962, the House Committee on Education and Labor reported an equal pay bill incorporating the "comparable work" standard. H. Rep. No. 1714, 87th Cong., 2d Sess. (1962). The committee bill, however, added an additional defense for wage differentials resulting from "a bona fide job classification program." H.R. 11677, 87th Cong., 2d Sess. (1962).

On the House floor the bill was further limited so as to allow only comparisons of jobs in the same place of employment. 108 Cong. Rec. 14765-67 (1962). In addi-

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[5] [Continued]

House Hearings at 173 (testimony of James B. Carey, Secretary-Treasurer, AFL-CIO Industrial Union Department, and President, International Union of Electrical, Radio & Machine Workers); *id.* at 261 (testimony of Gerald R. Coleman, Executive Secretary, United Hatters, Cap & Millinery Workers International Union).

[6] Opposition to the Administration proposal was led in the 1962 Hearings by the National Association of Manufacturers:

> This use of "comparable" opens a Pandora's box of dispute. "Equal" is a definite word. At best, "comparable" is a dubious word frought with dispute inviting complications.
>
> The most conscientious administrator, given these broad terms, could find fairly, quite different types of work to be "comparable" in character or requiring "comparable skills." The bill does not provide any specific basis for determining what jobs require comparable skills. It is difficult to imagine how it could. These terms "comparable character" and "comparable skills" do not necessarily mean the same job. In fact, they are so general and so vague as to give an administrator a grant of power which would destroy the sound wage structure which many industrial companies have worked for years to perfect. This emphasizes the patent desireability of substituting "equal" for "comparable" in any reasonable consideration of the bill whether by its proponents or opponents.

1962 House Hearings at 166.

tion, the House amended the bill to restrict the comparison to "equal work on jobs the performance of which requires equal skills." 108 Cong. Rec. 14767-71 (1962).

In introducing this amendment, Representative St. George argued: "The word 'comparable' opens up great vistas. It gives tremendous latitude to whomever is to be arbitrator in these disputes." 108 Cong. Rec. 14767 (1962). Representative Hiestand, the ranking minority member on the Select Subcommittee which reported the bill, argued in support of the amendment:

> . . . I think there are few represetatives of labor or management who would claim that it is possible to develop a job-evaluation system which could be depended upon in all cases to produce fair and mutually acceptable determinations of "work of comparable character . . ." [108 Cong. Rec. 14755 (1962).]

See also 108 Cong. Rec. 14768 (1962) (Statement of Rep. Landrum).[7]

The 87th Congress adjourned before completing work on the legislation.

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[7] Representative Zelenko, the Chairman of the Select Subcommittee and floor manager for the Committee bill, argued in support of the "comparable" work standard that it was possible to perform—"a realistic and practical appraisal of two jobs to determine whether they have enough like characteristics and skill demands to warrant the same basic pay rate," and he cited the orders and rulings of the National War Labor Board mandating equal pay for comparable jobs. 108 Cong. Rec. 14768-69 (1962).

The National War Labor Board had required the application of job evaluation to restructure wage scales according to the relative worth of men's and women's jobs. See, e.g., *General Motors Corporation*, 11 War Lab. Rep. 745 (1943); *Bendix Aviation Corp.*, 10 War Lab. Rep. 40, 45-46 (1943); *General Electric Co. and Westinghouse Electric Corp.*, 28 War Lab. Rep. 666, 685 (1945).

**2. The 1963 Hearings and Debates.**

In the first session of the 88th Congress, the Kennedy Administration submitted equal pay legislation which incorporated the "equal work" standard adopted by the House in the previous session and "the same place of employment" requirement. H.R. 3861, 88th Cong., 1st Sess. (1963); S. 910, 88th Cong., 1st Sess. (1963). In contrast to the earlier proposal, however, the bill did not include an exception for wage differentials established pursuant to bona fide job classification programs. *Id.* A number of other proposals were introduced based on the "comparable work" standard. See, e.g., H.R. 1151, 88th Cong., 1st Sess. (1963); S. 882, 88th Cong., 1st Sess. (1963).

During the 1963 hearings on this legislation, the principal area of contention continued to be the proposal to require equal pay as between different jobs based on proof of comparability. E.g., Hearings on S. 882 and S. 910 Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 88th Cong., 1st Sess., 12-13 (1963) (statement of Senator Clifford Case in support of the comparable work standard); Hearings on H.R. 3861 and Related Bills before the Special Subcommittee on Labor of the House Committee on Education and Labor, 88th Cong., 1st Sess. 199 (1963) (hereafter cited as "1963 House Hearings . . .") (testimony of Council of State Chambers of Commerce); *id.* at 117 (statement of the Bendix Corporation); *id.* at 138, 145-46 (statement of John G. Wayman, Esq., all opposed to the comparable work standard). Employer representatives strongly disputed that job evaluation was a scientific process which could be objectively and uniformly applied in determining comparable worth. See, e.g., 1963 House Hearings at 237-38 (testimony of Ezra G. Hester for Corning Glass Works); *id.* at 170 (testimony of William Miller for Chamber of Commerce of the United

States); *id.* at 261 (testimony of Jerry N. Markham for Thatcher Glass Manufacturing Co.).

The employers argued that the "equal work" standard should itself be limited to require not only equality in skills, but equality in other factors traditionally taken into account in fixing wages, such as effort, responsibility and working conditions;[8] they also argued that the defenses in the bill for wages fixed pursuant to a seniority or merit incentive system were too narrow and that the bill should exclude wage differentials based on job classification systems and factors such as different costs to the employer. 1963 House Hearings at 95-98, 99-102 (testimony of W. Boyd Owens for Owens-Illinois Glass Co.); *id.* at 135 (statement of American Retail Federation); *id.* at 139, 146 (statement of John G. Wayman, Esq.); *id.* at 168, 171 (testimony of William Miller for the Chamber of Commerce of the United States); *id.* at 184 (testimony of Fred C. Edwards for Armstrong Cork Co.); *id.* at 194-95, 198-201, 206 (testimony of James E. Fagan for Council of State Chambers of Commerce); *id.* at 232-33, 238 (testimony of Ezra G. Hester for Corning Glass Works); *id.* at 307-08 (statement of S. Herbert Unterberger). Finally, a number of witnesses expressed concern that the phrase "place of employment" could be misinterpreted to allow comparisons of jobs in different facilities of the same employer. 1963

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[8] In concurring in these arguments, Rep. Griffin stated:

> You don't have any idea and we don't either, if this bill were to pass, what the Secretary of Labor would say is equal work. There are thousands and thousands and thousands of job classifications which would be hanging in the balance until some representative of the Department of Labor came in and decided himself, on the basis of some general rule which the Department might try to lay down, which are difficult to apply, whether or not a classification, even though you agree with your union on it, is reasonable.

1963 House Hearings at 169.

House Hearings at 139, 146 (testimony of John G. Wayman, Esq.); *id.* at 194, 199 (testimony of James E. Fagan for Council of State Chambers of Commerce); *id.* at 279, 281 (testimony of John B. Olverson for Electronic Industries Association).

On May 20, 1963, the House Committee on Education and Labor reported an equal pay bill as an amendment to the Fair Labor Standards Act. H. Rep. No. 309, 88th Cong., 1st Sess. (1963). The bill not only retained the "equal work" standard, it was further narrowed to apply only to jobs equal in "skill", "effort", "responsibility" and "working conditions". H.R. 6060, 88th Cong., 1st Sess. (1963). In addition, the Committee added defenses for "a system which measures earnings by quantity or quality of production," and for differentials "based on any factor other than sex." *Id.*[9] Finally, the bill was modified to substitute the word "establishment" for the words "place of employment". *Id.*

H.R. 6060 was approved by the full House of Representatives in substantially the form recommended by the House Committee. The floor debates on this bill make clear that Congress' purpose in adopting the "equal work" standard, and in adopting the other limitations on liability, was to narrow the area in which strict liability would be imposed based on third party evaluations of the relationships between different jobs. Thus, Representative Goodell stated:

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[9] The House Report explained the addition of the latter defense as follows:

> As it is impossible to list each and every exception, the broad general exclusion has been also included. Thus, among other things, shift differentials, restrictions on or differences based on time of day worked, hours of work, lifting or moving heavy objects, differences based on experience, training, or ability would also be excluded. It also recognizes certain special circumstances, such as "red circle rates." [H. Rep. No. 309 at 3.]

> Last year when the House changed the word 'comparable' to 'equal' the clear intention was to narrow the whole concept. We went from 'comparable' to 'equal' meaning that the jobs involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing' and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear. [109 Cong. Rec. 9197 (1963). See also 109 Cong. Rec. 9209].

In this form the bill was also passed by the Senate and became law. 109 Cong. Rec. 9761 (1963).

In summary, the hearings and debates leading to enactment of the Equal Pay Act make clear that in adopting an "equal work" standard, Congress determined that comparison of the skill and other elements of jobs should not be a litmus test for determining whether those jobs are properly paid except where the jobs involved are "substantially" the same. Although consideration was given to the nature of the statutory defenses and to the other provisions defining the bill's scope, the adoption of the "equal" work rather than the "comparable" work standard was the major substantive decision in the Congress. It is also clear that Congress addressed only the question of when equal pay should be required on the sole basis of a comparison of job duties. Congress did not consider whether or to what extent to prohibit other discriminatory wage practices or sexually discriminatory employment practices not involving pay. With this his-

tory in mind, we next consider the possible interpretations of the Bennett Amendment to determine which is most consistent with the statutory language and the Congressional purpose.

## II

There are three possible interpretations of the Bennett Amendment and the related legislative history that have been suggested.

One is the interpretation urged by the petitioner—that by virtue of the Bennett Amendment no sexually discriminatory compensation practice is unlawful under Title VII unless that practice also constitutes a violation of the Equal Pay Act.

A second interpretation is that the Bennett Amendment incorporates, either in Title VII cases alleging equal work and unequal pay or in all Title VII cases alleging a sexually discriminatory pay practice, the four defenses stated in the Equal Pay Act.

A third interpretation is that Congress intended to incorporate into Title VII the substantive standards and the four defenses of the Equal Pay Act to govern the *type* of case with which the latter dealt—*viz.*, cases involving claims of equal pay based solely on comparisons of job duties.

Given the nature of the legislative materials, there are two basic approaches to the question presented. The first is to determine the Bennett Amendment's meaning, reading its language and that of the Equal Pay Act to which the Amendment expressly refers, most naturally. The argument for this approach is that the Amendment is, after all, the legislative act in question and that where the secondary materials do more to confuse than inform, a plain meaning rule should be followed. The second is to examine the statutory words in a manner that "reconstitute[s] the gamut of values current at the time

when the words were uttered" (*Work Manufacturers* v. *NLRB*, 386 U.S. 612, 620 (1967) (quoting L. Hand, J.)) and to conduct that examination as specified by Mr. Chief Justice Marshall "[w]here the mind labours to discover the design of the legislature, it seizes every thing from which aid can be derived . . ." (*United States* v. *Fisher*, 2 Cranch 358, 386 (1805).)

As we show now, the four defenses interpretation is perfectly consistent with the plain meaning of the statute, but not with the lessons to be drawn from the Equal Pay Act debate or with Senator Bennett's contemporaneous explanation of his Amendment. The Equal Pay Act incorporation theory is plausible under a plain meaning approach and, on balance, most accurately reflects the total corpus of the legislative materials. Petitioners' suggested interpretation violates the plain meaning of the Bennett Amendment and attributes to Congress a purpose that is contradicted by the relevant legislative materials.

### A. The "Four Defenses" Interpretation.

The Equal Pay Act provides that an employer who "within any establishment . . . pay[s] wages to employees . . . at a rate less than the rate at which he pays wages to employees of the opposite sex . . . for equal work on jobs the performance of which requires equal skill, effort and responsibility and which are performed under similar working conditions," is engaged in sex discrimination, unless the payments are made "pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex." The Bennett Amendment, in turn, specifies that an employer who "differentiates upon the basis of sex" in paying his employees does not violate Title VII "if such differentiation" is "authorized by [the Equal Pay Act]." Literally, the only "differentia-

t[ions] upon the basis of sex authorized by the Equal Pay Act" are the practices which would have been defined as sex discrimination by that Act but for its four stated exceptions. And, of course, if those pay practices do not constitute sex discrimination even where equal work is involved (*viz.*, in the situation in which the differentiation is most suspect), as a matter of logic such practices would not be "discrimination" in the less clear cases in which the work done by men and by women is unequal. The foregoing makes sense out of, and takes account of, all the statutory language.

At the same time, it would be surprising for Congress in 1964, without any discussion of the point, to reverse the decision made a year earlier to require a showing of "equal" work as a predicate to an equal pay claim and at the same time carefully preserve the four defenses stated in the Equal Pay Act. That reverses the order of priorities in the 1961-1963 debate. Moreover, Senator Bennett's reference to the "very careful study" which accompanied consideration of the equal pay bill, as well as his expressed intent "that in the event of conflict, the provisions of the Equal Pay Act shall not be nullified," indicate a purpose to assure that the substantive decisions made by Congress in its consideration of equal pay legislation were not overridden by Title VII's broad prohibition against sex discrimination in compensation. Finally, Senator Clark's statement appears designed to refute the objection that Title VII "do[es] not include the limitation in [the Equal Pay Act] with respect to equal work . . ., and thus, cut[s] across different jobs." Cf. *Teamsters* v. *United States*, 431 U.S. at 352 ("It is inconceivable that § 703(h) . . . was intended to vitiate the earlier representations of the Act's supporters by increasing Title VII's" scope in this area).

**B. The Equal Pay Act Incorporation Interpretation.**

There is, as we have noted, a second interpretation that is consistent with the statutory language—that Congress intended to incorporate into Title VII the equal work requirement of the Equal Pay Act in cases involving claims for equal pay based solely on comparison of job duties.[10] That alternative, moreover, appears to reflect "the gamut of values current" in the 1963 and 1964 Congress.

A statute may reasonably be said to "authorize" conduct that it does not prohibit when the legislative materials demonstrate that a broader prohibition was considered and rejected on the ground that such a prohibition would be unsound. The deliberations of the Congress in connection with the Equal Pay Act show that Congress considered a *per se* requirement of equal pay based on evidence of job comparability and determined for reasons of policy to reject such a requirement.

This interpretation of the word "authorized" meets the concern expressed by Sen. Bennett in that incorporation of the equal work standard insures that Title VII will not conflict with the Equal Pay Act or with any Congressional decisions embodied in the earlier Act. This

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[10] It does not follow, however, that by the adoption of the Bennett Amendment Congress intended to restrict the *coverage* of equal pay requirements under Title VII to employers covered by the Fair Labor Standards Act. "The thrust of [§ 703(h)] is directed toward defining what is and what is not an illegal discriminatory practice . . . ." *Franks* v. *Bowman Transp. Co.*, 424 U.S. at 761. Nothing in the 1964 legislative history of the Bennett Amendment indicates any intention to limit the coverage set forth in Section 701(b). In fact, Sen. Clarks' statement on this point is squarely to the contrary, see pp. 7-8, *supra*. From the beginning, the EEOC has interpreted the Bennett Amendment as addressing substantive and not coverage issues. See 30 Fed. Reg. 14928 (1965), 29 C.F.R. § 1604.7 (1966); 37 Fed. Reg. 6836 (1972), 29 C.F.R. § 1604.8(a) (1980).

approach is also consistent with Sen. Clark's rebuttal of the expressed concern over comparisons that "cut across different jobs," and with his statement that "[t]he *standards* in the Equal Pay Act for determining discrimination as to wages . . . are applicable to *the comparable situation* under Title VII." (Emphasis added).

Representative Celler's statement does not point to a different conclusion. His statement must be narrowed in some manner, because it is obvious that compliance with the Equal Pay Act does not satisfy all of the various requirements of Title VII relating to discrimination on grounds of sex. It is reasonable to assume that Representative Celler, like Senator Clark, referred to the requirements of Title VII governing equal pay based on job comparisons.

Senator Bennett's statement and Senator Dirksen's response on the floor of the Senate in 1965, see *supra*, note 4, are not authoritative as guides o the legislative intent. Their colloquy took place more than a year after passage of Title VII and in the context of unrelated legislation. To the extent the last sentence of Senator Bennett's memorandum goes beyond the language of his amendment and his contemporaneous explanation, the Senator's colleagues were not informed of his intent before they voted and he was not constrained by the necessity of crafting a proposal that would secure their approval. It is for these reasons that, so far as we are aware, or petitioners show, this Court has never relied on a post-legislative statement that is more expansive than the original. See *Teamsters* v. *United States*, 431 U.S. at 354, n.39; *United Airlines, Inc.* v. *McMann*, 434 U.S. 192, 200, n.7 (1977). The only significance of Sen. Bennett's 1965 statement is as evidence of the "chaos" and "confusion" that accompanied the adoption of his amendment in 1964, and this itself undercuts the sweeping interpretation urged by the petitioners.

Further, the 1965 Bennett statement itself is contradictory as it first indicates that the Equal Pay Act only authorized wage differentials as between exempt employees and as permitted by the four defenses, but then concludes that "discrimination in compensation on grounds of sex does not violate Title VII unless it also violates the Equal Pay Act". The conclusion does not follow from Senator Bennett's analysis. In any event, Senator Bennett's statement did not consider the issue presented here of whether Title VII prohibits discriminatory compensation practices that depend upon more than comparisons of job duties in unequal jobs.

The original interpretation of the Bennett Amendment by the EEOC in 1965 also supports the interpretation we suggest. The EEOC Regulation, not unlike Senators Clark and Bennett, was explicitly concerned with avoiding "conflicting interpretations or requirements with respect to situations in which both statutes are applicable." [11] With reference to such situations, the 1965 EEOC

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[11] See 30 Fed. Reg. 14927 (Dec. 2, 1965), 29 C.F.R. / 1604.7 (1966). The full text of the relevant portion of the interpretation regulation is as follows:

> (a) Title VII requires that its provisions be harmonized with the Equal Pay Act (section 6(d) of the Fair Labor Standards Act of 1938, 29 U.S.C. 206(d)) in order to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable. Accordingly, the Commission interprets section 703(h) to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII. However, it is the judgment of the Commission that the employee coverage of the prohibition against discrimination in compensation because of sex is co-extensive with that of the other prohibitions in section 703, and is not limited by section 703(h) to those employees covered by the Fair Labor Standards Act.
>
> (b) Accordingly, the Commissions will make applicable to equal pay complaints filed under Title VII the relevant interpretations of the Administrator. Wage and Hour Division,

Regulation interpreted the Bennett Amendment "to mean that the standards of 'equal pay for equal work' set forth in the Equal Pay Act for determining what is unlawful discrimination in compensation are applicable to Title VII." The other early EEOC materials cited by petitioner, Bf., pp. 81-88, are all to the same effect.[12]

**C. Petitioners' Interpretation.**

In contrast to the two possibilities just reviewed, petitioners' interpretation cannot be reconciled with the language of the Bennett Amendment. Ordinarily, statutes are not said to "authorize" all that they do not forbid. In legislating, Congress may, but need not and on the whole does not, take an entire subject in hand. The normal course is to build the "law" piece by piece, attending to one problem as defined by a bill's proponents and then another, through discrete prohibitions. A synthesis—a codification—may emerge, or it may not. So long as there is no synthesis, subjects related to the one treated in terms by a federal statute are simply not regulated by federal law. There is nothing in the language of the Equal Pay Act demonstrating an intent by Congress to deviate from its normal course and "authorize" all sexually discriminatory pay practices not there prohibited.

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Department of Labor. These interpretations are four in 29 Code of Federal Regulations. Part 800 119-800.163. Relevant opinions of the Administrator interpreting "the equal pay for equal work standard" will also be adopted by the Commission.

(c) The Commission will consult with the Administration before issuing an opinion on any matter covered by both Title VII and the Equal Pay Act.

30 Fed. Reg. 14928 (1965)

[12] The 1965 Regulation constituted the EEOC's broadest interpretation of the exemption from liability resulting from the Bennett Amendment. Compare 30 Fed. Reg. 6836 (1972), 29 C.F.R. § 1604.8; Attachments to Letter from General Counsel, EEOC to Clerk, United States Court of Appeals, Third Circuit, in *IUE* v. *Westinghouse Elec. Corp.*, dated, Oct. 14, 1980

Petitioners' interpretation also does not square with the legislative materials respecting the enactment of the Bennett Amendment or with the Congressional purpose in 1963 when it limited the scope of the Equal Pay Act to "equal work". While these materials evidence an intent not to override decisions made in connection with the enactment of the Equal Pay Act, they do not lend any support to the view that Congress intended to insulate a wide variety of sexually discriminatory employment practices not examined in 1963.[13]

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[13] There is nothing in the decision of this Court in *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976) which supports petitioners' position. In *Gilbert*, the Court considered the relevance of the interpretations of the Wage and Hour Administrator under the Equal Pay Act on the question of whether a denial of benefits for disabilities relating to maternity constitutes a denial of *equal pay* for equal work. *Id.* at 144. The Court's reliance on the Bennett Amendment to indicate the applicability to Title VII of the requirements of the Equal Pay Act on this point indicates that the effect of the Amendment is not limited to the adoption of the four Equal Pay Act defenses, but it in no way implies that Title VII's prohibition against sex discrimination compensation is limited to denials of equal pay for equal work.

None of the lower court cases on which petitioner relies hold that the Bennett Amendment immunizes all sexually discriminatory compensation practices not forbidden by the Equal Pay Act. In *Ammons* v. *Zia Co.*, 448 F.2d 117 (10th Cir. 1971), *Orr* v. *MacNeill & Sons, Inc.*, 511 F.2d 166 (5th Cir. 1975), *Calage* v. *University of Tennessee*, 544 F.2d 297 (6th Cir. 1976), and *DiSalvo* v. *Chamber of Commerce*, 568 F.2d 593 (8th Cir. 1978), the plaintiffs claimed that they were denied equal pay for equal work. In *Ammons*, *Orr* and *Calage*, the claim was denied on the facts. In *DiSalvo*, the claim was sustained. There was no issue in these cases, and no discussion in the courts' opinions, of whether Title VII compensation claims not based on job comparisons are limited by the provisions of the Equal Pay Act. In *Stastny* v. *Southern Bell Tel. & Tel. Co.*, 628 F.2d 267, 281 (4th Cir. 1980), the court rejected a sex discrimination in compensation claim that was based solely on a comparison of the earnings of men and women in broad categories of jobs. In *Lemons* v. *City of Denver*, 620 F.2d 228 (10th Cir.), *cert. denied*, 49 U.S.L.W. 3250 (October 6, 1980), the em-

## CONCLUSION

The interpretation we suggest is consistent with the result reached by the court of appeals in this case. The court held that a *prima facie* case of discrimination in compensation may not be established under Title VII solely on the basis of evidence showing that the duties of unequal jobs performed by men and women were com-

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ployer based its pay scales on wages for similar jobs prevailing in the community. The Court rejected the claim of the plaintiffs, a group of nurses, that because of historic discrimination in the society, their compensation should not be based on the compensation for nurses prevailing in the community, but on the compensation paid for other City and County jobs which they contended were "of equal worth to the employer." *Id.* at 229.

We note that there are other decisions in three of these circuits, not cited by petitioner, that hold or state that Title VII's prohibition against sex discrimination in compensation is not limited by the Equal Pay Act, or, at least, indicate that the question is open in the circuit. In *Fitzgerald* v. *Sirloin Stockade*, 624 F.2d 945 (10th Cir. 1980), the court expressly rejected the employer's claim that Title VII's prohibition against sex discrimination in compensation is limited to circumstances violative of the Equal Pay Act. "It was found that the plaintiff was discriminated against solely because of her sex in a manner that is not within the scope of the Equal Pay Act. This finding does not offend the Bennett Amendment and Equal Pay Act standards should not be controlling." *Id.* at 953 & n.2. In *EEOC* v. *Aetna Ins. Co.*, 22 FEP Cases 607 (4th Cir. 1980), an Equal Pay Act case, the Court stated "Title VII is broader [than the Equal Pay Act] and affords a worker the opportunity to challenge other discriminatory compensation practices." *Id.* at 611, n.5. In *Burdine* v. *Texas Department of Community Affairs*, 608 F.2d 563 (5th Cir. 1979), *cert. granted*, 100 S.Ct. 3009 (1980), a Title VII case in which plaintiff alleged a denial of equal pay for equal work, the court noted the decision of the Ninth Circuit in this case, and, without mentioning its own decision in *Orr*, left open the question of whether *Gunther* would be followed when the issue arose. See also *Roesel* v. *Juliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1978).

In addition, the position urged by petitioner has been rejected by the Ninth Circuit in this case and by the Third Circuit in *IUE* v. *Westinghouse Elec. Corp.*

parable, but remanded for consideration of other evidence of sex discrimination in compensation. 623 F.2d at 1321. This result is fully consistent with the statutory language and with the purposes of Title VII and the Equal Pay Act.

For the reasons stated, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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No. 80-429

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

COUNTY OF WASHINGTON, ET AL., *Petitioners,*

v.

ALBERTA GUNTHER, ET AL., *Respondents.*

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

## MOTION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* AND BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS *AMICUS CURIAE*

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COUNTY OF WASHINGTON, ET AL., *Petitioners,*

v.

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**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## MOTION OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE*

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American Society for Personnel Administration ("ASPA") moves the Court under Rule 42 for leave to file a brief herein as *amicus curiae.*

ASPA's interest in this case arises from its position as the world's largest association of personnel and industrial relations executives, representing nearly 30,000 professionals in business, government, and education dedicated to the furtherance of personnel and industrial relations management. Accordingly, ASPA and its member have an interest in the orderly development and enforcement of the myriad laws and regulations which govern every aspect of employment.

ASPA has been in the forefront of efforts to professionalize the field of personnel management. With respect to the subject of compensation, ASPA has devoted enormous energy towards increasing the state of the art and the proficiency of compensation managers to accurately and fairly develop compensation systems and plans. ASPA has sponsored seminars on this topic and conducted studies on various compensation issues, including a review of the question of job evaluation and compensation. Central to these efforts is ASPA's belief that professionally developed and administered compensation and job evaluation systems are the surest way to assure equality in the workplace.

Because of ASPA's long involvement in this area, it views with alarm the possible adoption of a judicial theory of "comparable worth" in the context of equal employment opportunity law. Adoption of a comparable worth theory would open the compensation structure of substantially every employer in the country to judicial review. This is a matter of broad concern transcending the immediate interests of the parties to the case at bar. Consideration of this matter from a broader perspective than those of the immediate parties will, it is hoped, be of substantial assistance to the Court.

ASPA therefore seeks leave to file a brief as an *amicus curiae* in the classical traditional sense: not to weigh in on one side or the other, but to try to further "the public interest in the administration of justice," *Universal Oil Co.* v. *Root Refining Co.*, 328 U.S. 575, 581 (1946), by ensuring that the Court is made fully aware of the context of decisions such as that in this case, and is alerted to the startling implications of the "comparable worth" theory. ASPA hopes both that such an exposition may be useful to the Court in

deciding this case, and that the Court may find it appropriate to give the lower courts guidance in this respect. ASPA takes no position on the merits of the case at bar.

Respectfully submitted,

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December 29, 1980

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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No. 80-429

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COUNTY OF WASHINGTON, ET AL., *Petitioners,*

v.

ALBERTA GUNTHER, ET AL., *Respondents.*

---

**On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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## BRIEF OF AMERICAN SOCIETY FOR PERSONNEL ADMINISTRATION AS *AMICUS CURIAE*

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### INTEREST OF THE *AMICUS CURIAE*

The interest of American Society for Personnel Administration as *amicus curiae* is set forth in the foregoing Motion.

### SUMMARY OF ARGUMENT

The adoption of a "comparable worth" concept is not supported by the statutory language or the legislative history of Title VII. Any endorsement of such a concept by the Court would impede the free functioning of the employment market, in contravention of longstanding Congressional labor policy, and would result in unnecessary judicial entanglement. The Court should take the opportunity afforded by this case to re-

ject the "comparable worth" concept, and in so doing, reaffirm appropriate legislative and judicial standards in the treatment of such cases.

## ARGUMENT

Section 703(a) of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a), makes it "an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation . . . because of such individual's race, color, religion, sex, or national origin." Involved in this case is the question whether it is "discrimination" under this statute for an employer to pay different wage rates for wholly different jobs if the court finds them to be of "comparable worth" — either to the employer subjectively, or in light of an industrial engineering analysis of the components of disparate jobs.

We respectfully urge the Court, whatever ultimate disposition it may make of this case, not to endorse this theory. Its endorsement would inescapably open the compensation structure of substantially every employer in the country to judicial review, with court-ordered and court-supervised restructuring of pay scales in light of the reviewing court's own job evaluations.

Substantially all employers maintain a hierarchy of pay levels. For whatever reasons, a job in one pay level may be predominantly occupied by members of one race or sex, and a wholly different job in a higher pay level may be occupied by members of another race or the other sex. If a person of the first race or sex in the lower-paid job could successfully contend that his job was of "comparable worth" to the higher-paid job, so that his payment at the lower rate while persons of the other group in the other job were paid at the higher rate

was a violation of Title VII, the remedy would have to be to shift the lower-paid job to the higher pay level. (*All* holders of the lower-paid job, of whatever race and sex, present and future, would of course have to be moved to the higher rate; otherwise the remedy would be more directly discriminatory than the original violation. Hence, the remedy would entail moving the entire job permanently into the higher category.) Other jobs or pay levels than the two immediately involved might then have to be adjusted accordingly. The problem might well be further compounded by *other* claims of discrimination, perhaps involving *other* sexual, racial, religious, or national origin groups, as among yet *other* jobs at *other* pay levels. The logical next step would then be the proposition that it is discriminatory for the pay differential between two jobs of concededly different "worth" to be disproportionate to the difference between the "worths," thus requiring an adjustment of those pay scales by the court in the light of its evaluation of the differences. And so on; the possible combinations and ramifications are almost limitless.

The courts — upon whom falls the burden for the enforcement of Title VII[1] — should be loath to enter such a thicket. Nor is this a fanciful "parade of horrors," in light of the evolution of the basic, and seemingly straightforward, concept of "discrimination" into an intricate and highly technical subject often involving duels of experts in the upper reaches of

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[1] It must always be remembered that the Equal Employment Opportunity Commission is not itself an enforcement agency. Though its "guidelines" are often loosely called "regulations," this is a misnomer, for it has no authority to issue substantive regulations. For enforcement of Title VII it must turn to the courts like any other litigant. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 141-142 (1976).

statistical theory, econometrics, and industrial psychology. See, *e.g.*, *Albemarle Paper Co.* v. *Moody*, 422 U.S. 405 (1975); *Ensley Branch, NAACP* v. *Seibels*, 14 FEP Cases (BNA) 670 (N.D.Ala. 1977), *affd. in part and revd. in part*. 616 F.2d 812 (5th Cir. 1980). That triers of fact have already been led into such obscure labrinths is itself good reason for courts to be reluctant to embark upon still more novel and untried theories without crystal-clear guidance from Congress. See *Vuyanich* v. *Republic National Bank*, 24 FEP Cases (BNA) 128 (N.D.Texas 1980).

Certainly, nothing in the legislative history of Title VII suggests that it was meant to empower courts to readjust "the economic balance and relationships prevailing in the community among the myriad of positions in the job market." *Lemons* v. *City and County of Denver*, 620 F.2d 228, 229 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3211 (October 7, 1980). The emphasis in the Congressional debate — as in the cases in this Court ever since — was simply that the statute was meant to remove an impendiment to the free functioning of the employment market: to remove "artificial, arbitrary, and unnecessary barriers to employment," *Griggs* v. *Duke Power Co.*, 401 U.S. 424, 431 (1971), "to assure equality of employment opportunities and to eliminate those discriminatory practices and devices which have fostered racially" — and it may be added, sexually — "stratified job environments to the disadvantage of minority citizens." *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792, 800 (1973).

Indeed, the legislative history is explicit that Title VII leaves the employer free to structure his business and his operating policies according to his best judgment in the light of economic realities and market conditions,

so long as he provides genuinely equal opportunity of access to economic benefits. Senator Clark pointed out that "the employer may set his qualifications as high as he likes, and may hire, assign, and promote on the basis of test performance," and pointed out further that "nothing in the bill will interfere with merit hiring or merit promotion. The bill simply eliminates consideration of color from the decision to hire or promote." 110 Cong. Rec. 7218 (April 8, 1964). Such assertions of the independence of the employer are wholly inconsistent with any notion that the statute was meant to open an employer's entire pay structure to judicial reconstitution. As the Court of Appeals for the Eighth Circuit put it in *Christensen* v. *State of Iowa,* 563 F.2d 353, 356 (8th Cir. 1977), "nothing in the text and history of Title VII suggest[s] that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. . . . Title VII [does not require] an employer to ignore the market in setting wage rates for genuinely different work classifications."

Any other conclusion would fly in the face of the uniformly expressed public policy that wage scales are to be determined in the marketplace by the free negotiations of the parties, who are best able to evaluate the interplay of the myriad economic factors, shifting from time to time, from place to place, from industry to industry, and from firm to firm, that must enter into such determinations in a free economy. With the one very special exception of the minimum wage laws, federal legislation has been aimed not at interfering with this process or substituting for it, but at removing barriers to its untrammeled functioning. Thus, the National Labor Relations Act is designed to implement the declared "policy of the United States" of eliminating "obstruc-

tions to the free flow of commerce" by "protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of employment. . . ." 29 U.S.C. § 151. See also *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970). The Equal Pay Act was designed to redress "the weaker bargaining position of many women. . . ." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 206 (1974). And Title VII itself, to repeat, was designed to remove the barriers that racial and other prejudice had erected to the access of minority members and women to the free job market. Only last Term, this Court reemphasized that Title VII was enacted "against the backdrop of this Nation's longstanding labor policy of leaving to the chosen representatives of employers and employees the freedom . . . to establish conditions of employment applicable to a particular business or industrial environment." *California Brewers Association* v. *Bryant*, 444 U.S. 598, 608 (1980).

This Court has long recognized the need to exercise restraint in reviewing the substance of employment decisions. It has historically adopted the role of neutral umpire, not substituting its judgment for that of the participants. It has viewed its role in interpreting statutes designed to regulate the workplace as ensuring that the *process* of employment is fair, and has resisted interfering in the *results* of that process. See *Furnco Construction Corp.* v. *Waters*, 438 U.S. 567, 578 (1978); *H.K. Porter Co.* v. *NLRB, supra,* at 108. Adoption of a "comparable worth" theory under Title VII would signal the abandonment of this prudent policy, and put the courts into the business of evaluating work factors, compensation systems, and the economic decisions of businessmen and unions in an attempt to reorder pay

scales to try to ensure that shifting racial or sexual groups were paid at equivalent or proportionate compensation levels with other groups in different jobs based on judicial determinations as to degrees of "comparability."

"Comparable worth" is not a new issue. Only a year before the passage of Title VII, Congress took a hard look at the morass into which this theory would lead, and decisively rejected the idea that the courts should be thrust into it. The original bills that eventually become the Equal Pay Act of 1963, 29 U.S.C. § 206(d)(1), adopted a "comparable worth" approach. Thus, Congressman Zelenko, sponsor of H.R. 11677 in the 87th Congress, one of the key parent bills of the Equal Pay Act, described it (referring to a letter from the Secretary of Labor discussing the distinction between "equal" and "comparable") as requiring that " 'work of comparable character' on jobs requiring 'comparable skills.' . . ." must be paid for on an equal nondiscriminatory basis. 108 Cong. Rec. 14768 (July 25, 1962). Congresswoman St. George, stating her fear that the term "comparable" was too nebulous and would allow "tremendous latitude to whoever is to be arbitrator in these disputes," proposed on the House floor an amendment to change the language "work of comparable character" to "equal work." 108 Cong. Rec. 14767 (July 25, 1962). Congressman Landrum concurred, observing that "[i]f, in fact, we want to establish equal pay for equal work, then we ought to say so and not permit the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States." 108 Cong. Rec. 14768

(July 25, 1962). Congresswoman St. George's amendment was adopted, and in its version of the bill the Senate later employed similar language.

That bill failed in conference action in the adjournment rush at the end of the 87th Congress. It was reintroduced early in the 88th Congress. In that Congress, even the use of "equal" rather than "comparable" terminology[2] did not allay concerns that the enforcing authority — and therefore the courts — "could be cast in the position of second-guessing the validity of a company's job evaluation system." *Corning Glass Works* v. *Brennan, supra* at 200. Congress accordingly modified the language still further, using language which "ensure[d] that wage differentials based upon bona fide job evaluation plans would be outside the purview of the Act." *Id.* at 201.

It is hardly plausible that Congress, only a year after this careful consideration and rejection of "comparable worth" in the Equal Pay Act, would have thrust the courts into that same morass on a far broader scale, *sub silentio* and by implication — especially since, in considering Title VII, Congress's attention was explicitly directed to the Equal Pay Act and an effort was made to harmonize Title VII with it.[3]

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[2] Congressman Goodell emphasized that the change from "comparable" to "equal" reflected the fact that "[w]e do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, 'Well, they amount to the same thing,' and evaluate them so they come up to the same skill or point." 109 *Cong. Rec.* 9197 (May 23, 1963).

[3] This effort is reflected in the so-called "Bennett Amendment," 42 U.S.C. § 2000e-2(h), last sentence. Since we do not believe

Finally, adoption of the theory is wholly unnecessary. There is no "loophole" in Title VII which can only be closed by invoking a novel theory of discrimination, nor will rejection of the "comparable worth" theory in any way inhibit the legitimate function of Title VII. An employer who deliberately skewed his wage system to the detriment of a racial or sexual group; that is, setting different compensation levels for functionally equal jobs solely because of the racial or sexual predominance in one of the jobs; or who adopted a pay scale that did not reflect the business necessities of the marketplace and was based on a job evaluation that was not *bona fide* but a mere pretext for invidious discrimination, would be guilty of a violation of Title VII, just as he would be if he adopted with malicious intent under a false pretext of legitimacy any other practice resulting in disparate treatment of a protected group. See *IUE* v. *Westinghouse Electric Corp.*, 23 FEP Cases (BNA) 588, 598-604 (3d Cir. 1980), *rehearing denied, pet. for cert. pending,* No. 80-781, (Van Dusen, J. dissenting); *Gerlach* v. *Michigan Bell Tel. Co., supra; cf. Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259 (3d Cir. 1970), *cert. denied*, 398 U.S. 905 (1970) (Equal Pay Act). This is not to say that every compensation system

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that Title VII was intended to include a "comparable worth" concept in the concept of "discrimination," we do not believe it necessary to address the construction of the Bennett Amendment. See *Christensen* v. *State of Iowa, supra*; *Gerlach* v. *Michigan Bell Tel. Co.*, 448 F.Supp. 1168 (E.D.Mich. 1980). In any event, the Bennett Amendment was not the first manifestation of Congressional intent in this area. Two months prior to the adoption of the Bennett Amendment, Senator Clark, one of the floor managers of Title VII, assured the Senate that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under title VII." 110 *Cong. Rec.* 7218 (April 8, 1964).

would be subject to judicial review to determine if there was "pretextual" discrimination. Rather, as made clear in the Congressional history, the predicate of job equality as determined by Equal Pay Act standards must be met before the examination could begin. *Corning Glass Works* v. *Brennan,* supra; *Orr* v. *Frank R. MacNeill & Son, Inc.,* 511 F.2d 166 (5th Cir. 1975).

## CONCLUSION

We respectfully urge the Court to reject, in this case, any effort to have it endorse the "comparable worth" concept. For it to do so would work a radical change in the personnel policies of American industry and in the historic role of the courts. It would open the door to massive involvement by the federal courts in restructuring and governing one of the most sensitive aspects of the economy. Such a result would be wholly inconsistent with the longstanding policy of Congress in favor of free determination of wage rates in the marketplace. Nothing in Title VII itself or its legislative history suggests that Congress contemplated such a result; quite the contrary. Nor is any such concept needed for the effective enforcement of Title VII.

Respectfully submitted,

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December 29, 1980

No. 80-429

DEC 29 1

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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THE COUNTY OF WASHINGTON AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY,

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF AMICI CURIAE OF THE EQUAL EMPLOYMENT ADVISORY COUNCIL INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION NATIONAL ASSOCIATION OF COUNTIES NATIONAL LEAGUE OF CITIES AND NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION IN SUPPORT OF THE PETITIONERS

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The Amici Curiae, with the written consent of all parties, respectfully submit this brief as Amici Curiae in support of the Petitioners.

## INTEREST OF THE AMICI CURIAE

The Amici Curiae are public and private employer associations whose members' job evalution and compensation systems could be affected by the Court's decision in the instant case.[1] In its decision below, the Ninth Circuit held that a disparity in the pay rates for two different jobs, one predominantly held by male employees and the other by females, even though not actionable under the Equal Pay Act (29 U.S.C. § 206(d)) because of the dissimilarity between the jobs, nevertheless could violate Title VII of the Civil Rights Act of 1964 (42 U.S.C. § 2000e, *et seq.* (Title VII)). The Amici Curiae are concerned that affirmance of the decision below would be directly contrary to the will of Congress and could have unwarranted, adverse effects on widely used and accepted compensation systems.

## STATEMENT OF THE CASE

The plaintiffs are female jail matrons who allege that the County violated Title VII by paying them less than it pays male corrections officers. During the trial, they attempted at length, but without success, to demonstrate that the work they performed was substantially equal to that of the male jailers. Both the district court and Ninth Circuit found that the matrons' jobs were substantially dissimilar to the male jail jobs. The Ninth Circuit stated that male guard work was "qualitatively different" from the matron position because of the "significantly greater effort and . . . responsibility" involved. (Pet. App. at 30a). In addition, the male jobs in question were "open to both males and females," (Pet. App. at 23a), but despite the matrons' concern about equal pay, they did not apply to become corrections officers. (Pet. App. at 68a).

The Ninth Circuit acknowledged that the dissimilarity between the two jobs would preclude recovery under the Equal Pay Act. Nevertheless, the court held that the

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[1] The individual Amici Curiae are described in the Appendix to this brief.

plaintiffs could attempt to prove on remand sex-based wage discrimination based on other unexplained theories. In so holding, the Ninth Circuit attempted to distinguish the situations to which the Equal Pay Act and Title VII apply. It stated that the Equal Pay Act applies only when there has been a denial of equal pay for equal work, not "where the plaintiff is performing *comparable* (but not substantially equal) work . . ." (Pet. App. at 32a, emphasis added); but it viewed Title VII as a much broader statute.

This conclusion was based upon the panel's narrow construction of the "Bennett Amendment" to Title VII, which states that it is not illegal for an employer to differentiate on the basis of sex "if such differentiation is authorized by the provisions of [the Equal Pay Act]." Although finding that either of two possible interpretations was "plausible" (Pet. App. at 33a), the panel held that the amendment only incorporated the Equal Pay Act's four affirmative defenses into Title VII and did *not* also impose impose the Equal Pay Act's "equal work" standard upon Title VII as the *sole* basis for sex-based compensation claims. The primary basis for the panel's holding was that there was no "clear Congressional directive" (Pet. App. at 36a) that would apply to the situation before the Court.

In a supplemental opinion denying the County's petition for rehearing, the Ninth Circuit reaffirmed its initial ruling that Title VII may be construed to cover sex-based compensation claims which do not meet the "equal work" standard of the Equal Pay Act. (Pet. App. at 2a-19a). The court stated that "a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII. It is unnecessary to determine now what theories might be feasible." (Pet. App. at 18a).

In response to the County's concerns that the court's order would undermine the equal work standard of the

Equal Pay Act, the Ninth Circuit stated that (Pet. App. at 17a-18a, emphasis added):

> The effect of our decision will not be to substitute a "comparable" work standard for an "equal" work standard. Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. *In most cases*, an equal work theory will provide the *most practical method* of establishing a prima facie case of wage discrimination.

It supported this portion of its opinion by noting that when Congress enacted the Equal Pay Act, it rejected the "comparable" work standard. (Pet. App. at 17a). The case thus was remanded to the district court to consider plaintiffs' alternative claims.

## SUMMARY OF ARGUMENT

The social problem of sex-based compensation discrimination directed primarily against females received close Congressional scrutiny during the deliberations on the Equal Pay Act. After extensive hearings and debates, Congress realized that the means for resolving the problem must be carefully chosen to be "meaningful to employers and workable across the broad range of industries covered by the Act." *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 198 (1974). Because of the numerous problems involved in making comparisons between dissimilar jobs, Congress rejected comparable work language and adopted the equal work standard.

The next year, the same Congress passed Title VII, which provided qualified female plaintiffs with equal opportunity in hiring, transfers and promotions, but also, through the Bennett Amendment, ensured that the standard applicable to sex-based wage discrimination claims

would be the "equal work" standard. Congress thereby intended to prevent courts and federal agencies from becoming entangled in adjudicating the wage rates for dissimilar jobs, while guaranteeing women access to all jobs with the same pay as men performing equal work.

By permitting a Title VII cause of action in a situation where the equal work standard has not been met, the Ninth Circuit has misinterpreted and undermined the intent of Congress. The court's primary error lay in its conclusion that, absent direct evidence to the contrary, Title VII's general prohibition of sex discrimination in employment must prevail over the more specific provisions of the Equal Pay Act. The court thus misconstrued the burden of proof in legislative interpretation and breached this Court's well-established rule of *in pari materia* construction. When Congress has addressed a particular problem with a specific statute (here the Equal Pay Act), that statute will control over more general legislation (here Title VII) regardless of which was first enacted, unless there is clear legislative history showing that the standards in the specific statute were not intended to apply to the more general statute. *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976). There is no legislative evidence whatsoever that Title VII's general ban on employment discrimination based on sex was meant to supplant the equal work standard.

The Ninth Circuit's concern that intentional discrimination might be involved in wage discrimination cases does not require a different conclusion. Assertions of intentional wage discrimination against women were fully considered when Congress passed the Equal Pay Act. Congress' response was to limit the involvement of the government and the courts to situations involving equal work. Also, stark evidence of intentional discrimination is rare. *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Thus, proving that an employer paid less to women than

men for performing "comparable" jobs would require a determination of whether or not the jobs in fact were "comparable." This is precisely the analysis Congress rejected as an unworkable and inappropriate exercise for the courts. Once the courts began dissecting and analyzing employers' wage setting processes in search of indirect evidence of intentional discrimination, they would inevitably become bogged down in the wage setting process. For as numerous experts have recognized, "there is no universally accepted value system" to determine whether "a set of given . . . salary relationships are or are not discriminatory." *Comparable Worth: Issues and Alternatives* 10 (E. R. Livernash ed. 1980) (hereinafter cited as Livernash).

The courts and federal agencies are ill-equipped to make judgments concerning job evaluation and wage rates which involve comparisons of the characteristics of different jobs. Even experienced experts in job evaluation and compensation recognize that the methodologies and techniques of their field are not readily adaptable to judicial application. It should not be taken for granted, therefore, that Title VII enables protected groups other than women to establish compensation discrimination based upon the comparability of jobs, or that rejection of the equal work standard is necessary in order that women not be treated differently from other protected classes.

Furthermore, the negative impact of such an undertaking on the economy, on established compensation and collective bargaining systems, and on the labor market would be immense. Congress plainly sought to avoid these adverse consequences when it legislated in this area in 1963 and 1964. Where Congress has resolved a particular labor relations problem, it is only Congress, and not the courts, that can change this statutory compromise. *National Woodwork Manufacturers Association* v. *NLRB*, 386 U.S. 612, 644 (1967).

## ARGUMENT

### CONGRESS DID NOT INTEND, IN ENACTING TITLE VII, TO INVEST THE FEDERAL COURTS WITH JURISDICTION TO DISSECT AND ANALYZE EMPLOYERS' PAY POLICIES IN SEARCH OF EXPLANATIONS FOR DIFFERENCES IN THE WAGES PAID TO MEN AND WOMEN PERFORMING DISSIMILAR JOBS.

Resolution of the issues in this case turns upon the relationship between the Equal Pay Act and Title VII. The correct approach was aptly summarized by Judge Van Dusen in his dissenting opinion in *IUE* v. *Westinghouse Electric Corp.*, 23 FEP Cases 588, 604 (3d Cir. 1980), *pet. for reh'g denied, pets. for cert. pending*, Nos. 80-781 & 80-944:

> [R]ead together Title VII and the Equal Pay Act provide a balanced approach to resolving sex-based wage discrimination claims. Title VII guarantees that qualified female employees will have access to all jobs, and the Equal Pay Act assures that men and women performing the same work will be paid equally. This approach provides a mechanism for eliminating sex-based wage discrimination, while, at the same time, assuring that the courts and federal agencies will not become entangled in adjudicating the wage rates to be paid for dissimilar jobs—a process in which they have little expertise.

Thus, "[s]ufficient remedies exist under Title VII to deal with discriminatory hiring and promotional practices, without the courts becoming embroiled in determinations of how an employer's work force ought to be paid." *Kohne* v. *Imco Container Co.*, 480 F. Supp. 1015, 1039 (W.D. Va. 1979). The Ninth Circuit's decision is directly at odds with Congress' approach and should be reversed. For where Congress has acted "to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the develop-

ing state of labor relations in this country," then it is only Congress and not the courts that can change that pattern.[2]

### A. The Ninth Circuit's Opinion Circumvents the Will of Congress by Inviting Plaintiffs to Compare the Relative Components of Dissimilar Jobs as a Basis for Sex-Based Compensation Claims.

The Ninth Circuit's treatment of the relationship of the Equal Pay Act to Title VII is inconsistent. In the first instance, it recognized the importance of the Equal Pay Act's legislative history and stated that "when the Congress included sex into Title VII it was fully aware, from the previous year's hearings, of the employment problems of women." (Pet. App. at 16a-17a). It noted that Congress rejected the "comparable" work standard when it adopted the Equal Pay Act. (Pet. App. at 17a). The court held, in light of this history, that the "equal" work standard would be binding on Title VII plaintiffs whose sex-based compensation claims were based merely upon a comparison of male and female jobs. (*Id.*).

Nevertheless, the Ninth Circuit proceeded to disregard Congressional intent by holding that Title VII sex-based compensation claims could be proved under some standard other than the equal work standard. Indeed, the court stopped short of foreclosing claims based solely on comparison of different jobs. Rather, it stated that "[i]n most cases" the equal work theory would provide the "most practical," but apparently not the sole, method of establishing a claim. (Pet. App. at 17a).

The Ninth Circuit's opinion thus invites plaintiffs with job comparison claims to circumvent the equal work standard by contending that differentials in pay between jobs performed by males and females are too great to be explained by plaintiffs' conception of the difficulty, skill, training, etc., involved in the two jobs. The inquiry thus

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[2] *National Woodwork Mfrs. Ass'n* v. *NLRB*, 386 U.S. 612, 644 (1967).

is shifted from a relatively narrow examination of the "equality" of the jobs,[3] to a comparison of the various components of dissimilar jobs to see if their respective characteristics explain the wage differential. Whether or not the complaint contains an allegation of purposeful discrimination, this type of suit would necessarily entail the kind of judicial inquiry Congress intended to preclude when it passed the Equal Pay Act—*i.e.*, "second-guessing the validity of a company's job evaluation system."[4] It was precisely to avoid this type of suit that Congress refused to "authorize the Secretary [of Labor] or the Courts to engage in wholesale reevaluation of any employer's pay structure in order to enforce their own conceptions of economic worth."[5]

The argument that an allegation of intentional discrimination somehow changes the character of these cases and requires the abandonment of the equal work stand-

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[3] A determination of whether the jobs are "equal" requires an examination into whether the same skill, effort, responsibility and working conditions are involved. *See Corning Glass Works* v. *Brennan*, 417 U.S. 188, 200-01 (1974). Even this relatively simpler level of inquiry has given the courts "no small difficulty" in its application. *Angelo* v. *Bacharach Instrument Co.*, 555 F.2d 1164, 1170 (3d Cir. 1977).

[4] *Corning Glass Works*, 417 U.S. at 200.

[5] *Brennan* v. *Prince William Hosp. Corp.*, 503 F.2d 282, 285 (4th Cir. 1974), *cert. denied*, 420 U.S. 972 (1975); *Christopher* v. *Iowa*, 559 F.2d 1135 (8th Cir. 1977) (comparability of jobs insufficient to establish an Equal Pay Act violation); *Horner* v. *Mary Inst.*, 21 FEP Cases 1069, 1074 (8th Cir. 1980); *Imco Container Co.*, 480 F. Supp. at 1039.

This concern that the decision below will invite comparisons of dissimilar jobs is not speculative. The Solicitor General has argued that the *Gunther* decision holds that Title VII "prohibits discrimination on the basis of sex among employees holding 'comparable,' although not 'substantially equal,' jobs" and that Title IX of the Education Amendments of 1972 should be enforced on the same basis. *See* Reply Memorandum for Petitioner in *United States Dep't of Educ.* v. *Seattle Univ.*, U.S. No. 80-493 at 2, n.1.

ard is misleading. As shown below, Congress was fully aware of the existence of intentional wage discrimination when it passed the Equal Pay Act. It recognized the breadth of this social problem, but also realized that the problem "was more readily stated in principle than reduced to statutory language which would be meaningful . . ." *Corning Glass Works* v. *Brennan*, 417 U.S. at 198. After extensive study and debate, the equal work standard was adopted to narrow the basis for enforcement and interpretation.

Similarly, allegations of intentional sex discrimination in the setting of compensation are more readily generalized than substantiated. The existence of the "smoking gun" that demonstrates the employer's culpability is far more unusual than some might postulate. Consequently, because instances of "stark" intentional discrimination "are rare," the courts would be required to "look to other evidence." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 429 U.S. 252, 266 (1977). Indeed, in the instant case, the plaintiffs have essentially based their compensation claims upon their dissatisfaction with the size of the pay differential between the two jobs and upon a comparison of the characteristics of their jobs with those performed by males. Whether the necessary inquiry is labelled as a search for indirect evidence of intentional discrimination or as a comparison of dissimilar jobs, the process of resolving such claims would be an extremely difficult undertaking, as Congress recognized in rejecting such an approach.

Although it cited no illustrative direct evidence where sexism was the impetus for wage setting in predominantly female jobs in this or any other reported case, the Ninth Circuit set forth two hypotheticals that purportedly illustrate the dangers in applying the equal work standard. First, it was concerned that an employer could tell a female worker, whose job was not held by any male, that it would pay her more for that work if she were

a male. (Pet. App. at 54a n.9). This is another version of the hypothetical argument that under the equal work standard an employer could isolate a predominately female job category and arbitrarily cut its wages because no man was performing the job. But insofar as hiring or placement discrimination caused the isolated job category, Title VII already provides sufficient remedies (such as back pay, transfer and constructive seniority) without resort to job comparisons. Moreover, in this hypothetical, only one job category is involved and there would be no need to inquire whether, and to what extent, the difference in wages for *dissimilar* jobs was caused by factors based upon sex. Thus, the hypothetical is unrelated to the question in issue.

In the Ninth Circuit's second example, a job held primarily by women is "comparable" but not substantially equal to a job performed by men, and the employer decreases (because of their sex) the rate of the job held by women. (Pet. App. at 54a n.9). Or, to the same effect, the job held primarily by women is left at the same wage level, while the rates of "comparable" jobs held by men are increased; or the rate of the job held by women is not raised by as much as the comparable but dissimilar job held by men. In these situations, the key question once again is whether the jobs are "comparable." Yet, as the Ninth Circuit itself acknowledged (Pet. App. at 17a), Congress had previously rejected involvement by the courts in determinations of what was "comparable."

Comparison of different jobs and the wage rate relationship between them has been recognized by job evaluation experts to be an uncertain process. Where comparability determinations are involved, "[f]rom a logical basis, it is impossible to prove that a set of given structural wage or salary relationships are or are not discriminatory." Livernash at 10.[6] Similarly after a

[6] Other job evaluation experts agree. *See* Livernash at 41 (Milkovich: "The unresolved dilemma facing researchers is how

complete analysis of methods for measuring whether the residual wage differential between different jobs is due to discrimination, another study concluded that concepts of sex-based wage discrimination, as now formulated, remain amorphous theories based upon unmeasurable concepts. It stated: "the experts agree that the necessary analytical methodology [to determine whether a wage differential is discriminatory] does not exist today." *See* Nelson, Opton & Wilson, *Wage Discrimination and the "Comparable Worth" Theory in Perspective*, 13 U. Mich. J.L. Ref. 231, 253-58, 288 (1980) (hereinafter cited as Nelson, Opton & Wilson).

This widespread recognition of the enormous practical problems inherent in any effort to identify the existence or specific impact of discrimination upon the relative wage rates paid to men and women performing dissimilar jobs is particularly pertinent to the issue before the Court, because it helps explain relevant Congressional intent. For, as shown below, the ambiguity in the concept of "comparability" was a major concern of Congress in 1962 and 1963 when it took its first and only detailed look at sex-based wage differentials.

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to separate that portion of differences in occupations that may be related to productivity and thus, wage differences, from the portion that is the product of discriminatory employment practices."); 59 (Schwab: "Unfortunately, job worth has not been adequately defined nor has a consensus emerged as to its meaning. In fact, authors have been remarkably reticent to offer any definitions of worth at all. As a consequence, there is very little basis for accepting one set of compensable factors as better representing worth than any alternative set."); 94 (Hildebrand: "What must be emphasized here, however, is that the comparability and the rank order obtained are purely statistical artifacts: both depend upon the evaluation method chosen."). *Accord*, Lindsay, *Equal Pay for Comparable Work: An Economic Analysis of a New Antidiscrimination Doctrine*, Law and Economics Center, University of Miami (1980) at 3 ("But, wage determinations in different occupations is a complex, simultaneous process. Relative wages result from the interplay of supply and demand in each occupation and are unlikely to correspond very well to the predictions of any simple, single-equation statistical model.").

It would be contrary to the legislative history of Title VII and the Equal Pay Act to suggest that liability for wage differentials could be based upon untenable methodology or that the courts should become heavily involved in determining compensation practices. Indeed, as the Court indicated in *United Steelworkers* v. *Weber*, 99 S. Ct. 2721 (1979), Title VII could not have been passed "without substantial support from legislators in both Houses who traditionally resisted federal regulation of private business." 99 S. Ct. at 2729. As their price for supporting Title VII, they demanded that "management prerogatives and union freedoms . . . be left undisturbed to the greatest extent possible." *Id.*[7] Those same concerns motivated Congress when it added the equal work standard to the Equal Pay Act to ensure that private parties would "have the maximum degree of discretion in working out . . . how much [employees] should be paid." 109 Cong. Rec. 9198 (1963) (remarks of Rep. Goodell). Because the Ninth Circuit's interpretation could severly disrupt existing employment practices (see below pp. 29-32) and would leave the courts and employers with no clear measure of liability or standard of proof, its construction should be rejected.

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[7] *Accord, Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 578 (1978) ("Courts are generally less competent than employers to restructure business practices, and unless mandated to do so by Congress they should not attempt it."). Section 703(h) limits the scope of Title VII and has been construed as an expression of Congressional recognition that there are practical reasons for permitting employment practices that would otherwise be illegal under the statute. *See Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 352 (1977); and *California Brewers Ass'n* v. *Bryant*, 100 S. Ct. 814, 820 (1980) (Title VII left employers and the employees' bargaining representative the "freedom through collective bargaining to establish conditions of employment applicable to a particular business or industrial environment."). Title VII thus was not intended to cure any and all societal problems that might be complained of as discriminatory. Congress has chosen to apply its regulatory authority only to those employment practices where the burdens of proof and disruption of the workplace would not be unreasonable or impractical.

Moreover, it cannot be assumed that applying the equal work standard to sex-based compensation claims necessarily would result in female plaintiffs being treated differently than other protected groups. It is not clear that the equal work standard would be applicable only to sex-based compensation claims,[8] and it has not been established that nonsex-based compensation claims could be maintained by comparing dissimilar jobs. Whatever the identity of the plaintiff, job comparison cases would still require the courts to set relative wages throughout entire wage structures for different jobs. The prohibitive statistical and practical difficulties of entertaining such claims would not evaporate simply because the plaintiffs are not females. *See* Nelson, Opton & Wilson at 326 n.15. The courts would be engaged in setting compensation according to their conceptions of job worth—a task that would be hopelessly involved and inappropriate for judicial resolution.

Although the standard for nonsex-based compensation claims need not be addressed by this court, it is noteworthy that the discrimination addressed by Title VII was manifest primarily in the segregation of minorities into inferior jobs rather than into jobs which were the same as or comparable to those performed by whites. The social issue addressed by the Equal Pay Act thus was distinct from the general thrust of Title VII and received special treatment from Congress. As shown below, Congress perceived the problem of discrimination in pay for the same and comparable work as a form of discrimination directed primarily at women. See p. 15 and n.10, *infra*. Congress provided a specific remedy after fully exploring and considering this particular type of discrimination.

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[8] See *Patterson* v. *Western Devel. Labs*, 13 FEP Cases 772, 776 (N.D. Cal. 1976); and *Chapman* v. *Pacific Tel. & Tel. Co.*, 456 F. Supp. 65, 68 n.5 (N.D. Cal. 1978).

### B. The Equal Pay Act's Equal Work Standard was Congress' Specific Response to Complaints of Compensation Discrimination Against Women.

The Equal Pay Act and Title VII were passed by consecutive sessions of the Eighty-eighth Congress. The extensive Equal Pay Act committee activity, hearings and floor deliberations examining the problem of sex-based compensation discrimination are in sharp contrast to the brief treatment given the entire subject of sex discrimination during Title VII's enactment.[9] In the Equal Pay Act's history, Congress devoted close attention to the approach which should be taken toward the problem of sex-based compensation discrimination. The court below, however, ignored the overriding importance of this history.

Perhaps the Ninth Circuit's most fundamental error was its conclusion that because the equal work language of the Equal Pay Act was narrower, Title VII's nonspecific ban of sex discrimination could be read as evidence of Congressional purpose to sanction sex-based compensation claims not envisioned by the Equal Pay Act. (*See* Pet. App. at 32a). The court below failed to view the Equal Pay Act in its proper perspective, that is, as Congress' specific resolution of a widespread and well-documented problem of compensation discrimination directed *primarily against women.*[10]

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[9] The legislative history of Title VII's sex discrimination provision is "notable primarily for its brevity." *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976).

[10] "Women have been the principal victims of discrimination in this area." Testimony of Secretary of Labor Goldberg. *Hearings Before the Select Subcomm. on Labor of the Comm. on Education and Labor on H.R. 8898 and H.R. 10226, Part 1*, 87th Cong., 2d Sess. 15 (1962) (hereinafter cited as *1962 House Hearings*).

"Principally, however, wage discrimination is practiced against the female worker. It is a condition that spreads across all levels of employment." Remarks of Representative Thompson, *Hearings*

Congress' response to exhaustive evidence of the societal differential in men and women's average wages,[11] and the existence of widespread intentional compensation discrimination against women,[12] was to enact the Equal Pay Act. As the Third Circuit stated:

> The Act was intended as a broad charter of women's rights in the economic field. It sought to overcome the age-old belief in women's inferiority and to eliminate the depressing effects on living standards of reduced wages for female workers and the economic and social consequences which flow from it.

*Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259, 265 (3d Cir.), *cert. denied*, 398 U.S. 905 (1970).

Although the widespread problem Congress addressed was copiously documented, "[t]he most notable feature of the history of the Equal Pay Act is that Congress recognized early in the legislative process that the concept of equal pay for equal work was more readily stated in

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*Before the Special Subcomm. on Labor of the Comm. on Education and Labor on H.R. 3861 and Related Bills*, 88th Cong., 1st Sess. 2 (1963).

The County's brief contains additional examples from the Congressional hearings and debates which demonstrate that Congress was well aware of the breadth of the problem of sex discrimination in wage rates.

[11] In the 1963 Equal Pay Act debates, Representative Dwyer stated:

> The gap between income levels of men and women workers is actually widening: In 1955, women workers' median income was 64 percent of that of men workers; in 1960, the median women's wage was only 61 percent of that of men.

109 Cong. Rec. 9199-200 (1963). *See also* the testimony of Assistant Secretary of Labor Esther Peterson, *1962 House Hearings* at 24-86.

[12] *See Corning Glass Works*, 417 U.S. at 195 (Equal Pay Act was enacted to remedy endemic problem of employment discrimination based on the out-moded belief that women should be paid less than men). *See also Shultz* v. *First Victoria Nat'l Bank*, 420 F.2d 648, 656-57, nn.17-20 (5th Cir.), *pet. for reh'g denied*, 420 F.2d 659 (5th Cir. 1969).

principle than reduced to statutory language which would be meaningful . . . ." *Corning Glass Works* v. *Brennan*, 417 U.S. at 198. The original language of the legislation proposed in 1962 would have authorized broad involvement by the courts in situations of alleged wage discrimination. In 1962, however, when the House deleted the "comparable work" standard and substituted the "equal work" standard, Representative St. George explained in introducing this change that there is a great difference between the terms equal and comparable: "The word 'comparable' opens up great vistas. It gives tremendous latitude to whoever is to be arbitrator in these disputes." [13] Congress, therefore, precluded the courts from making wage comparability determinations.

The 1963 House debates on the Equal Pay Act reveal a notable degree of bipartisan unanimity that the Congress should not permit the Secretary of Labor or the courts to engage in resolving broadly-stated allegations of sex-based compensation discrimination.[14] The remarks of Representative Goodell are representative and clearly point out the limited role Congress intended the courts to play in scrutinizing compensation systems. He stated:

> I think it is important that we have clear legislative history at this point. Last year when the House changed the word "comparable" to "equal" the clear intention was to narrow the whole concept. We went from "comparable" to "equal" meaning that the jobs

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[13] 108 Cong. Rec. 14767 (1962). See also the remarks of Representative Landrum, *Id.* at 14768, who stated that the "equal work" amendment would prevent: "the trooping around all over the country of employees of the Labor Department harassing business with their various interpretations of the term 'comparable' when 'equal' is capable of the same definition throughout the United States."

[14] *See* 109 Cong. Rec. at 9197 (1963) (remarks of Reps. Thompson and Griffin) and *Id.* at 9198 (Rep. Halleck). Representatives Frelinghuysen, Goodell, Thompson and Griffin expressed Congress' clear intention that comparisons of dissimilar jobs could not be the basis for compensation claims. *Id.* at 9195-98, 9208-10. The County's brief contains a complete exposition of the legislative history.

> involved should be virtually identical, that is, they would be very much alike or closely related to each other.
>
> We do not expect the Labor Department people to go into an establishment and attempt to rate jobs that are not equal. We do not want to hear the Department say, "Well, they amount to the same thing," and evaluate them so they come up to the same skill or point. We expect this to apply only to jobs that are substantially identical or equal. I think that the language in the bill last year which has been adopted this year, and has been further expanded by reference to equal skill, effort, and working conditions, is intended to make this point very clear.

109 Cong. Rec. 9197 (1963).

This history demonstrates that although Congress recognized the extent of sex-based compensation discrimination, it also realized that there were sound practical reasons to narrow the methods for resolving the problem. The Ninth Circuit's approach, therefore, is unsupportable.

### C. The Ninth Circuit Erred When it Concluded that the Language of Title VII Necessarily Meant that Congress Intended to Expand the Law Applicable to Sex-Based Compensation Claims.

The Ninth Circuit's statutory analysis stems from the incorrect premise that Title VII's undefined sex discrimination provision must be read as broader than the Equal Pay Act, absent evidence of Congressional intent to the contrary.[15] That notion conflicts directly with this Court's repeated holding that " '[w]here there is no clear inten-

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[15] The court stated that Title VII's plain broad language should not be limited "in the absence of a clear Congressional directive." (Pet. App. at 36a). It further speculated, without any reference to any legislative history whatsoever, that Congress "may have believed that the Equal Pay Act by itself was inadequate to remedy sex discrimination, or that broader protections were necessary." (Pet. App. at 17a).

tion otherwise, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment.'" *Radzanower* v. *Touche Ross & Co.*, 426 U.S. 148, 153 (1976), *citing Morton* v. *Mancari*, 417 U.S. 535, 550-51 (1974). *See also United States* v. *United Continental Tuna Corp.*, 425 U.S. 164, 169 (1976). As with the statutes involved in those cases, when Congress passed the narrower provisions of the Equal Pay Act, "it was focusing on the particularized problems" (426 U.S. at 153) of sex-based compensation discrimination. Under this Court's decisions, the fact that Title VII addresses sex discrimination in more general terms than the Equal Pay Act is no reason to effectively repeal the Equal Pay Act by allowing plaintiffs to bring claims under Title VII and circumvent the earlier Congressional judgments.

As we now show, there is no legislative history concerning Title VII which indicates Congress intended to abandon its carefully developed "equal work" standard for adjudicating sex-based wage discrimination claims. Actually, whenever Congress did refer to sex-based wage discrimination during the consideration of Title VII, its intent clearly was to preserve the equal work standard and not to nullify the judgments reflected in the Equal Pay Act.

### D. The Legislative History of Title VII Demonstrates that the Equal Work Standard was to be Applied to All Sex-based Compensation Claims.

Title VII's legislative record indicates that the equal work standard was meant to apply to sex-based compensation discrimination claims under that Act as well. Indeed, there is no evidence whatsoever that Title VII was intended to be broader than the Equal Pay Act in this subject area.

H.R. 7152, the House bill ultimately enacted as the Civil Rights Act of 1964, was intended to protect pri-

marily the rights of Negroes and other minorities.[16] When it went to the House floor for consideration, it did not contain any sex discrimination provision. "In fact, the matter of sex discrimination had not even been considered during the [House] hearings." Miller, *Sex Discrimination and Title VII of the Civil Rights Act of 1964*, 51 Minn. L. Rev. 877, 880 (1967) (hereinafter cited as Miller).[17] Indeed, "[i]n view of the political pressures which surrounded the bill, it is hardly surprising that no one [at that time] viewed it as a vehicle to secure equal rights for women." Miller at 880.

It was not until the penultimate day before passage after two weeks of debate that an amendment to add sex discrimination was introduced by Representative Howard Smith of Virginia, Chairman of the House Rules Committee and Title VII's principal opponent.[18] Since the sex discrimination provision of Title VII was given very little consideration by the House, no congressonal mandate can be found to "extend the [sex discrimination] coverage of the Act to situations of questionable application. . ." [19]

### 1. *The Clark Memorandum*

When the civil rights bill was considered by the Senate after it had passed the House, the Senate "paid especial

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[16] Editors Note, EEOC, *Discrimination Forbidden: Sex Discrimintaion, Legislative History of Titles VII and XI of the Civil Rights Act of 1964*, 3213; *Developments in the Law—Employment Discrimination and Title VII of the Civil Rights Act of 1964*, 84 Harv. L. Rev. 1109, 1166 (1971); and 110 Cong. Rec. 2581 (1964) (remarks of Rep. Green).

[17] *See also* 110 Cong. Rec. 2582, 2720 (1964) (remarks of Rep. Green).

[18] Miller at 880; Note, *Employer Dress and Appearance Codes and Title VII of the Civil Rights Act of 1964*, 46 S. Cal. L. Rev. 965, 968 (1973).

[19] *Willingham* v. *Macon Tel. Publishing Co.*, 507 F.2d 1084, 1090 (5th Cir. 1975) (*en banc*).

attention to the provisions of the Equal Pay Act." [20] For example, after the House passed the bill with the sex discrimination provision and the Senate had debated it for three weeks, Senator Clark, one of Title VII's floor managers, submitted a memo in response to several of the questions and unfounded objections that had been raised regarding the meaning of the bill.[21] One of the objections was that Title VII's sex discrimination provision would extend the Equal Pay Act's coverage, did not contain the equal work standard and thus would "cut across different jobs." 110 Cong. Rec. 7217 (1964). The reply was that "[t]he standards in the Equal Pay Act for determining discrimination as to wages, of course, are applicable to the comparable situation under Title VII." *Id.*[22]

Thus, even before the Equal Pay Act was mentioned in Title VII in the Bennett Amendment, the bill's sponsors understood that sex discrimination wage claims would not be broadened to "cut across different jobs" and be applied to jobs that were not "equal." This was a clear reply to concerns that Title VII might be construed to permit wage claims when dissimilar jobs were involved, and was not, as the Ninth Circuit assumed (Pet. App. at 7a-8a), a statement that the equal work standard would apply to Title VII only when a plaintiff alleged that "equal work" was involved. The Ninth Circuit's construction would interpret Senator Clark's statement as agreeing with the objection he had selected for rebuttal. On

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[20] *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 143 (1976). In that decision, the Court held that the Bennett Amendment made interpretations of the Equal Pay Act's core "equal pay for equal work" provision applicable to Title VII. The decision held that the employer's disability benefit plan did not violate Title VII, relying in part upon an interpretation by the Wage and Hour Administrator of the core "equal pay for equal work" provision of the Equal Pay Act. *Id.* at 144.

[21] 110 Cong. Rec. 7208, 7215, 7217 (1964).

[22] The objection and reply are set out in full at Pet. App. at 6a.

the other hand, applying equal work standard to all Title VII compensation claims based on sex would avoid any conflict between the two statutes with respect to the applicable legal standard. But the fact of the matter is, as shown by Senator Clark's memorandum, Congress intended, even before the Bennett Amendment was proposed, to preserve the "equal work" standard under Title VII. Certainly Senator Clark's comments do not indicate any intent to abandon the equal work standard under Title VII.

### 2. *The Bennett Amendment*

The Bennett Amendment, which states that it is not illegal for an employer to differentiate in compensation upon the basis of sex "if such differentiation is authorized by the provisions of section 6(d) of the Fair Labor Standards Act of 1938 [the Equal Pay Act] . . ." can thus be read as an explicit recognition of a limitation on the scope of the statute which Senator Clark felt was already clear. This construction, of course, explains why Senator Bennett's amendment was accepted by the floor leadership as a "technical" amendment to serve as a "clarification" of the statute. *See* 110 Cong. Rec. 13647 (1964). This interpretation, moreover, is consistent with Senator Bennett's statement, when he called up his amendment, that not enough attention had been paid to possible conflicts which could arise between the two statutes by the "wholesale" insertion of the word "sex" in Title VII. *Id.* He stated, "The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified." *Id.* The obvious intent was to limit the scope of Title VII, not to broaden it. This interpretation thus eliminates the statutory conflicts; the Ninth Circuit's exacerbates them.

The Ninth Circuit's interpretation, moreover, negates any need for the Bennett Amendment. The Equal Pay Act contains four statutory defenses. Except for the fourth defense (a factor other than sex), Section 703(h) already contained those defenses when the Bennett

Amendment was introduced on the Senate Floor after Title VII's initial House passage. The opening sentence of Section 703(h) already protected compensation based on a seniority system, a merit system or a system which measures earnings by quantity or quality of production. The fourth Equal Pay Act defense, a "factor other than sex," already was covered by the core provisions of Title VII which make Title VII applicable only if there is discrimination on the basis of sex. Thus, the conclusion that the Bennett Amendment was intended only to incorporate defenses which were already contained in the statute makes no sense, as it renders the Bennett Amendment superfluous and meaningless.[23]

Apparently recognizing that its analysis left the Bennett Amendment with no substantive content, the Ninth

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[23] In 1965, Senator Bennett realized that some commentators were interpreting his Amendment in the manner ultimately adopted by the Ninth Circuit in this case. To counter this construction, he stated that the Bennett Amendment was intended to assure that the same standards would be applicable to all wage rate claims brought under both Title VII and the Equal Pay Act. His interpretation stated in relevant part:

> The amendment therefore means that it is not an unlawful employment practice. . . . to have different standards of compensation for non-exempt employees, where such differentiation is not *prohibited* by the equal pay amendment to the Fair Labor Standards Act.
>
> Simply stated, *the [Bennett] amendment means that discrimination in compensation on account of sex does not violate Title VII unless it also violates the Equal Pay Act.*

111 Cong. Rec. 13359 (1965) (emphasis added).

When the Ninth Circuit refused to give this statement any weight because it could "at best" only reflect Senator Bennett's own understanding (Pet. App. at 4a-5a), it failed to make any reference to Senator Dirsken's statement that the interpretation was the one which he, Senator Humphrey and their staffs had in mind when the Bennett Amendment was adopted by the Senate. 111 Cong. Rec. 13360 (1965). He added that: "I trust that this will suffice to clear up in the minds of anyone, whether in the Department of Justice or elsewhere, what the Senate intended when that amendment was accepted." *Id.*

Circuit erroneously attempted to construe the affirmative defenses contained in the first sentence of Section 703 (h) as making "no substantive alteration of Title VII." (Pet. App. at 10a). Because it viewed Section 703(h) as not involving substantive matters, it stated that the Bennett Amendment "need not have effected a 'substantive' change." (*Id.*). The court's major premise, however, is incorrect. As this Court has made clear, Section 703(h) is "a definitional provision; as with the other provisions of § 703, subsection (h) delineates which employment practices are illegal and thereby prohibited and which are not." [24]

### 3. *The Celler Statement*

The Ninth Circuit also misinterpreted the statement by Congressman Celler (the bill's original sponsor and House floor leader) that the Bennett Amendment: "[p]rovides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section [703 (h)]." 110 Cong. Rec. 15896 (1964). By stating that "compliance with the [Equal Pay Act also] satisfies the requirement[s]" of Title VII, he recognized that differences in compensation that do not violate the Equal Pay Act are authorized by the Bennett Amendment for purposes of Title VII.

The Ninth Circuit, without reconciling the clear import of this statement, simply said that "this solitary comment" was "insufficient to establish the County's interpretation of the Bennett Amendment in view of the *contrary or inconclusive* legislative history previously discussed [by the court]." (Pet. App. at 8a, emphasis added). The court's choice of the words "contrary or inconclusive" is remarkable, because the court's previous discussion contained no reference to *any* legislative history af-

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[24] *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 758 (1976); *Int'l Bhd. of Teamsters* v. *United States*, 431 U.S. at 346-47; *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553, 559 (1977).

firmatively supporting its own interpretation. Thus, while brushing aside an argument to which it offered no real answer, the court conveyed the erroneous impression of legislative support for a contrary interpretation. This again illustrates that there is simply no clear Congressional directive permitting the courts to disregard the equal work standard.

### E. The Decisional Authority Demonstrates that Wage Discrimination Claims Under Title VII are Limited to Claims Which Satisfy the "Equal Work" Standard Developed by Congress Under the Equal Pay Act.

The Ninth Circuit concluded that most decided cases have not addressed whether Title VII reaches male-female wage differences which do not violate the Equal Pay Act. But as set forth more fully in the County's Brief and Petition for Certiorari (at 11-12 & n.4), virtually all courts have ruled that a Title VII plaintiff must prove the performance of equal work for unequal pay in order to establish a prima facie case of sex-based wage discrimination. (*See* Pet. for Cert. 11-12 & n.4 and cases there cited).[25] Those decisions show that the courts were clearly of the view that a Title VII sex-based compensation claim which fails to establish equal work cannot then proceed on some other theory of compensation discrimination.[26]

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[25] The primary contrary authority decided since the Ninth Circuit's opinion is the Third Circuit's holding in *Westinghouse*, which relied heavily on the decision below and, for the reasons stated herein, wrongly interpreted the relevant statutory language and history. As the dissent in *Westinghouse* pointed out (23 FEP Cases at 603): "Until the decision in *Gunther* . . . no court of appeals had held that a Title VII claim of sex-based wage discrimination could be made out without proof of equal work." Judge Van Dusen then criticized the Ninth Circuit's decision because it "fails to discuss the application of the *in pari materia* canon of statutory construction." *Id.*

[26] *See, e.g., Orr* v. *Frank R. MacNeill & Son, Inc.*, 511 F.2d 166, 171 (5th Cir.), *cert. denied*, 423 U.S. 865 (1975) ("To establish

The courts have recognized, moreover, that a broad reading of Title VII entails the risk of ignoring important economic and social factors which have significant legal consequences. For example, in *Christensen* v. *Iowa*, 563 F.2d 353 (8th Cir. 1977), female clerical workers argued that the University dicriminated against them by paying them less than male physical plant workers for jobs alleged to be of "equal value" to the University. The Eighth Circuit ruled that the plaintiffs had not established a prima facie case even apart from the Bennett Amendment. Instead of alleging a denial of an equal opportunity to work in the plant worker jobs, the female plaintiffs sought to establish a violation of the Act upon a showing that work of equal value to the employer did not command an equal market price. The Eighth Circuit held that:

> Appellants' theory *ignores economic realities.* The value of the job to the employer represents but one factor affecting wages. Other factors may include the supply of workers willing to do the job and the ability of the workers to band together to bargain collectively for higher wages. We find nothing in the text and history of Title VII suggesting that Congress intended to abrogate the laws of supply and demand or other economic principles that determine wage rates for various kinds of work. We do not interpret Title VII as requiring an employer to ignore the market in setting wage rates for genuinely different work classifications.

563 F.2d at 356 (emphasis added).

Claims of discrimination similar to those in *Christensen* were rejected in *Lemons* v. *City & County of Denver*,

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a case under Title VII it must be proved that a wage differential was based upon sex and that there was the performance of equal work for unequal compensation."); and *Ammons* v. *Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971) ("[T]o establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work. . . .").

620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3211 (U.S. October 7, 1980) (No. 80-82). There, nurses alleged that the city violated Title VII by paying them lower wages because their jobs were traditionally female jobs. They claimed their positions should receive at least as much as certain other comparable professional jobs. Relying on the Bennett Amendment, the Tenth Circuit noted that the "comparable work" standard had been rejected by Congress in favor of the "equal work" standard. It held that "[t]he Bennett Amendment is generally considered to have the equal pay/equal work concept apply to Title VII in the same way as it applies in the Equal Pay Act." 620 F.2d at 299-30. Because equal work was not involved, the claim was dismissed. The court added that:

> The courts under existing authority cannot require the City within its employment to reassess the worth of services in each position in relation to all others, and to strike a new balance and relationship.
>
> . . . Plaintiffs are not seeking equality of opportunity . . . but instead would cross job description lines into areas of entirely different skills. This would be a whole new world for the courts, and until some better signal from Congress is received we cannot venture into it.

620 F.2d at 229.

The Ninth Circuit's opinion, in the instant case, is even more divorced from economic realities than the positions of the plaintiffs that were rejected in the above cases, for the Ninth Circuit suggests no methodology whatsoever to determine whether some of the wage differential between "qualitatively different" jobs is due to discrimination. *See supra*, pp. 11-12 & n.6.

The courts in the cases discussed above were aware that Title VII guarantees qualified women access to jobs at the hiring stage, as well as other stages of employment such as transfers, promotions, and training opportunities. Those decisions were consistent with the broad thrust of Title VII's nondiscrimination approach which

was to assure equal opportunities for access to all jobs. In the instant case, both the district court and the Ninth Circuit found that the male jobs with which the matrons made their comparisons were "open to both males and females," (Pet. App. at 23a), but despite their concern about equal pay, the matrons did not apply for them. (Pet. App. at 68a). This factor was ignored by the Ninth Circuit.

Under the Ninth Circuit's approach, employees who have themselves viewed the higher pay as *insufficient* to compensate for the differences in the work involved in other jobs, may nevertheless sue for that higher pay while remaining in the job they prefer. The Ninth Circuit's ruling thus places employers in the potential position of bearing legal responsibility for a social phenomenon over which they have no control.[27]

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[27] Job preference thus is an important consideration and has been seen a rebutting factor to claims of sex discrimination. *See Hilton* v. *Wyman-Gordon Co.*, 624 F.2d 379 (3d Cir. 1980); *Mazus* v. *Dep't of Transportation*, 629 F.2d 870 (3d Cir. 1980); *Durant* v. *Owens-Illinois Glass Co.*, 23 EPD ¶ 31,118 (E.D. La. 1980); and *Davis* v. *City of Dallas*, 483 F.Supp. 54 (N.D. Tex. 1979).

Female preferences for particular occupations introduces yet another set of complex, essentially unmeasurable factors that would make wage comparability determinations extremely unreliable when different jobs are involved in compensation discrimination cases. For example, a recent United States Department of Labor Study concluded: "Despite affirmative action programs and publicity on the career success of women in stereotypical male positions, most women have not changed their career aspirations. They continue to plan careers in traditionally female positions. As a result, they continue to occupy lower paying positions." U.S. Dep't of Labor, Employment Training Administration, *Years for Decision*, Vol. 4 (1978) at iii. The study also stated (*id.* at 114):

> To the extent that women prefer a typically female occupation, affirmative action programs directed solely at employers will not substantially reduce occupational segregation. Hence, in addition to pursuing a vigorous affirmative action program, public policy undoubtedly should be concerned with counseling and educational programs if young women are to be informed about the full range of available occupations.

### F. The Potential Economic Consequences of the Ninth Circuit's Decision Clash With Congressional Intent.

As shown above, despite the Ninth Circuit's assurances to the contrary, its interpretation of Title VII would inevitably entangle the courts and administrative agencies in the process of analyzing and attempting to compare dissimilar jobs. Although it is difficult to estimate precisely all of the consequences its decision might have for the courts and the economy, recent studies by commentators and scholars have demonstrated that job comparison discrimination theories raise many economic and practical concerns which parallel those expressed by Congress when it narrowed the Equal Pay Act standard. A number of difficulties were summarized by Professor George Milkovich in the following observations:

> The debate over substituting comparable worth for equal work as the standard for wage discrimination hinges on two issues: (1) the current lack of a workable definition of comparable worth, and (2) more basically, the lack of any systematic analysis of the possible consequences of its application. . . . Will those currently employed in higher paid occupations perceive their wages to be unfairly low, and will future workers be less likely to invest in the training and education required for some of these jobs? How important are wage differentials in the allocation of the labor force? How will changing the occupational wage differentials affect individual decisions to choose one job over another, one career over another, or one employer over another?

Livernash at 46.

These problems were analyzed further by Professor George Hildebrand, who described the potential aggregate economic effect in the following terms:

> [T]he contemplated extension of the principle of equal pay for substantially equal work to encompass the vague rhetoric of comparable work is directed in essence to the reconstruction and the regulation of

> the wage and salary structures of defendant firms and their component parts throughout the county. Potentially, the scope for this exercise has no limits beyond the personnel and administrative capacities of the government agencies that would enforce it. In short, even assuming that the full achievement of such control might take several years, the proposal leads directly to administrative wage control for the entire American economy.

Livernash at 83. Addressing the social and economic consequences, Professor Hildebrand observed:

> In summary, economic theory tells us that if comparable worth is put into effect (1) unemployment rates for females will rise, (2) unemployment of females also will rise, (3) the major victims will be the poorest female workers, (4) welfare dependency will grow, (5) female youngsters will be large losers of job opportunities, and (6) there will be some withdrawal of discouraged women workers from the labor force, precisely because official policy, in the purported service of a peculiar concept of social justice, will have destroyed their jobs for them, despite their own efforts to be productive and self-supporting citizens.

Livernash at 106.[28]

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[28] Similar predictions of decrease in aggregate income, unemployment of women workers and disruption of the labor market have been made by Lindsay at 33-34, and Nelson, Opton & Wilson at 290-96 who also discussed the adverse effect that job comparability discrimination theories would have on affirmative action programs for women and their integration into the work force. The President of the International Ladies Garment Workers Union put the economic problems in this perspective:

> I'll be damned if I know a way to get the women more money. . . . The value of their work isn't set by theoretical principles but on the value of the work in the marketplace and in the face of competition from overseas, where garment workers make 30 cents an hour.

Address by S. Chaikin, President, ILGWU, AFL-CIO Annual Convention, Washington, D.C. (Nov. 15-20, 1979), quoted in *The New*

Similarly, job comparability discrimination theories could have a dramatic negative effect on collective bargaining. As Professor Herbert R. Northrup points out:

> Neither the EEOC nor any other government civil rights agency has ever demonstrated expertise in industrial relations or wage compensation, nor would they be acceptable arbiters to unions and managements. To have the EEOC or, for that matter, any government agency as the self-appointed determiner of job evaluation or wage levels, is certain to result in extensive controversy, litigations, and concomitant industrial strife. Moreover, the courts are not better suited in terms of expertise and are hardly more acceptable to the parties. What is being considered has the potential of drastically altering our system of collective bargaining, substantially increasing labor strife, dramatically raising labor costs, adding greatly to inflation, and worsening America's international competitive position.

Livernash at 133.[29]

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*Pay Push for Women*, Bus. Week at 69 (Dec. 17, 1979). *See also The EEOC's Bold Foray into Job Evaluation*, Fortune at 58-59 (Sept. 11, 1978) (Ordering employers to pay the same wages for work of equal value "would certainly correct imbalances rapidly, but the economy would surely be much disrupted in the process. At the extreme, to raise the aggregate pay of the country's 27.3 million full-time working women high enough so that the median pay for women would equal that of men would add a staggering $150 billion a year to civilian payrolls.").

[29] Such an intrusion would thwart the Congressional policy of protecting the collective bargaining process from excessive government regulation. *See, e.g., H. K. Porter Co.* v. *NLRB*, 397 U.S. 99 (1970); *NLRB* v. *Ins. Agents' Int'l Union*, 361 U.S. 477 (1960); and *California Brewers Ass'n* v. *Bryant*; 100 S. Ct. 814. Because of this policy, the courts have little experience in analyzing and evaluating jobs and setting wage rates, much less in evaluating economic factors, such as the comparative strength of intra-union pressure groups, the market price and market demand for various skills, the economic cost to the operation of raising the wages of persons in one group or another, and many other factors. *See also Christensen* v. *Iowa*, 563 F.2d at 353.

The deliberations and judgment of Congress on this issue reflected in the Equal Pay Act and the Bennett Amendment provide no support for the proposition that courts enforcing federal wage discrimination legislation can be thrust into adjudicating claims regarding dissimilar jobs. Among Congress' reasons for adopting the more limited "equal work" concept was that it was less vague than the "comparable work" approach and thus would limit the role of federal regulators and the courts.

Of course, qualified females not only have an equal opportunity—assured by Title VII—to be hired for or bid into any job category, but under the "equal work" standard they also must be paid the same as males if they perform substantially equal jobs." [30] And "[s]ince wage discrimination cannot survive the end of job separation, the integration of the workforce means the end of such wage discrimination as may exist." Nelson, Opton & Wilson at 298.

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[30] An Equal Pay Act violation does not hinge upon a showing that the jobs are absolutely equal or identical. It is sufficient that they are "substantially equal." *Shultz* v. *Wheaton Glass Co.*, 421 F.2d 259; *Angelo* v. *Bacharach Instrument Co.*, 555 F.2d 1164. This interpretation prevents employers from creating artificial job classifications which, although not substantially different, might be used as a subterfuge to escape the requirements of the Equal Pay Act.

## CONCLUSION

It would be contrary to clear Congressional intent, the rules of statutory construction and applicable legal precedent to permit the plaintiffs to draw the federal courts into the adjudication of wage rates of persons performing dissimilar jobs. The decision below could have serious economic and social consequences, which would upset the scheme established by Congress and entangle the judiciary in issues that would be difficult to resolve and almost impossible to manage. That approach was rejected by Congress and should be rejected by this Court.

Respectfully submitted,

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December 29, 1980

## APPENDIX

The Amici Curiae subscribing to this brief are described as follows:

### EQUAL EMPLOYMENT ADVISORY COUNCIL

The Equal Employment Advisory Council (EEAC) is a voluntary nonprofit association organized to promote the common interest of employers and the general public in the development and implementation of sound government policies, procedures, and requirements pertaining to nondiscriminatory employment practices. Substantially all of EEAC's members, or their constituents, are private employers subject to the provisions of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. §§ 2000e *et seq.* (Title VII), and The Equal Pay Act, § 6(d) of the Fair Labor Standards Act, 29 U.S.C. § 206(d).

Because of its interest in sex-based compensation cases and the related construction of Title VII and the Equal Pay Act, EEAC filed a brief supporting the petition for rehearing in the Ninth Circuit below. EEAC's arguments were treated at length by the Ninth Circuit. EEAC also has filed amicus briefs in two other important cases in this area. *See Lemons* v. *City & County of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 42 U.S.L.W. 3211 (U.S. Oct. 7, 1980) (No. 80-82); and *IUE* v. *Westinghouse Electric Corp.*, 23 FEP Cases 588 (3d Cir. 1980), *pet. for reh'g denied*, October 29, 1980, *pet. for cert. pending*, Nos. 80-781 & 80-944.

EEAC also has participated before this Court in other significant Title VII cases. *See, e.g., California Brewers Association* v. *Bryant*, 100 S. Ct. 814 (1980); *Great American Federal Savings & Loan Association* v. *Novotny*, 99 S. Ct. 2345 (1979); *International Brotherhood of Teamsters* v. *United States*, 431 U.S. 324 (1977); and *United Air Lines, Inc.* v. *Evans*, 431 U.S. 553 (1977).

## INTERNATIONAL PERSONNEL MANAGEMENT ASSOCIATION

The International Personnel Management Association (IPMA) is an organization representing 1,000 member agencies including civil service commissions, merit system boards, and personnel departments at the federal, state and local levels of government. The Association, which was established in 1973 by the consolidation of the Public Personnel Association (founded in 1906) and the Society for Personnel Administration (founded in 1937), represents over 55,000 individuals, primarily personnel professionals and personnel administrators in the public sector. IPMA attempts to foster and develop interest in sound personnel administration by providing a focus and forum for personnel professionals throughout the United States and abroad.

The International Personnel Management Association is totally committed to equity in wage administration. The Association believes that the Equal Pay Act of 1963 was carefully drafted by the United States Congress to mandate an equal pay for equal work standard, and that Congress specifically rejected use of the comparable worth standard as inherently impractical and unworkable. Further, the Association recognizes that wages are established not only through job evaluation methodologies but by supply and demand within the market place and by collective bargaining. In support of these beliefs, IPMA joins as an Amicus in the case at bar.

## NATIONAL ASSOCIATION OF COUNTIES

The National Association of Counties (NACo) is a non-profit organization, founded in 1935, that represents the interests of its 1900 member counties and their elected and appointed officials. American county governments employ hundreds of thousands of people in public service jobs. They are committed to the principle of nondis-

criminatory employment practices. But they believe that new standards for evaluating employment practices, such as "comparable worth," should not be developed on a case-by-case basis through time-consuming and costly litigation, particularly in the absence of a manifest congressional intent to do so under Title VII of the Civil Rights Act.

## NATIONAL LEAGUE OF CITIES

The National League of Cities (NLC) is an Illinois not-for-profit corporation organized in 1933 to assist municipalities in performing their functions. Its membership includes direct member cities, state municipal leagues and state league member cities. In all, almost 15,000 cities and municipalities, both large and small, are members of and participate in the activities of NLC. The functions of NLC as authorized in its Bylaws include "the safeguarding of the interests, rights, and privileges of municipalities." It is in this latter capacity that NLC offers its view in the case at bar. City governments are committed to the principle of nondiscriminating employment practices. But whatever may be the intrinsic merits of "comparative worth" or other new ideas of equality, from the perspective of city governments it is disruptive, costly, wasteful and basically inappropriate to develop such novel concepts in the courts of the nation by means of perhaps thousands of suits against city government employers under Title VII of the Civil Rights Act. This is particularly the case when evidence is lacking that Congress either intended these results or provided statutory guidance to these ends.

## THE NATIONAL PUBLIC EMPLOYER LABOR RELATIONS ASSOCIATION

The National Public Employer Labor Relations Association (NPELRA) is a national organization whose members are predominantly full-time city, county and

state government professionals involved in the implementation of employment and labor relations policies affecting over four million public employees. Its members come from all fifty states and are employed by jurisdictions with as few as 100 employees and as many as 200,000 employees.

NPELRA for the past ten years has been actively involved in the promotion of sound public policies and practices bearing on all facets of public sector employment relations, with special emphasis upon collective bargaining and equal employment opportunity matters.

NPELRA is especially concerned about the Ninth Circuit's broad interpretation of Title VII in this case. In particular, if the Ninth Circuit's view is sustained, the courts and the federal agencies charged with the enforcement of the civil rights laws would necessarily become involved in making decisions on the wages to be paid to millions of public employees, decisions which "[u]nder our democratic system of government . . . have been entrusted to elected officials who ultimately are responsible to the voters." *Abood* v. *Detroit Board of Education*, 431 U.S. 209, 258 (1977) (Powell, J., concurring). *Cf.*, *National League of Cities* v. *Usery*, 426 U.S. 833 (1976).

No. 80-429

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

COUNTY OF WASHINGTON, *et al.*,
*Petitioners,*

v.

ALBERTA GUNTHER, *et al.*

**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

## BRIEF *AMICI CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE COALITION OF LABOR UNION WOMEN, THE WOMEN'S EQUITY ACTION LEAGUE, THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA and NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1980

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No. 80-429

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COUNTY OF WASHINGTON, *et al.*,
*Petitioners,*

v.

ALBERTA GUNTHER, *et al.*

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**On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit**

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## BRIEF *AMICI CURIAE* OF THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, THE COALITION OF LABOR UNION WOMEN, THE WOMEN'S EQUITY ACTION LEAGUE, THE N.A.A.C.P. LEGAL DEFENSE AND EDUCATIONAL FUND, INC., THE WOMEN'S BAR ASSOCIATION OF THE DISTRICT OF COLUMBIA and NATIONAL EDUCATION ASSOCIATION IN SUPPORT OF RESPONDENTS

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## INTEREST OF AMICI CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963 at the request of the President of the United States to involve private attorneys in

the national effort to assure civil rights to all Americans. The Committee has over the past eighteen years enlisted the services of over a thousand members of the private bar in addressing the legal problems of minorities and the poor. The Committee's membership today includes past Presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. Through its national office and its nine local offices throughout the country, the Lawyers' Committee has been actively involved in the enforcement and interpretation of the Civil Rights Act of 1964. To secure the rights of minorities and of women, it has litigated well over a hundred cases under Title VII of that Act.

The Coalition of Labor Union Women (CLUW) is a national membership organization of women and men who are members of labor unions. CLUW has thirty active chapters throughout the United States with members from more than 65 International Unions. CLUW is dedicated to the participation of women within their unions and to removing all forms of discrimination in the workplace.

The Women's Equity Action League is a national membership organization created to promote educational, legal and economic equality for women. It has a particular interest in this case because of its commitment to the principle of fairly compensating work done by women on the same basis as work done by men.

The N.A.A.C.P. Legal Defense and Educational Fund, Inc. is a non-profit corporation established under the laws of the State of New York to assist minorities to secure their constitutional and statutory rights through the prosecution of lawsuits. Since the effective date of Title VII, the Fund has prosecuted hundreds of cases under that statute, challenging employment discrimination based on race or sex. Because many low-paid jobs for women are disproportionately held by blacks, the in-

terpretation of Title VII's ban on sex discrimination will have a strong impact on black women.

The Women's Bar Association of the District of Columbia is a voluntary, non-profit organization of attorneys with over 1000 members. The Women's Bar Association is concerned with local and national issues which particularly affect women and the law, and is dedicated to the advancement and protection of the interests of women.

The National Education Association is the nation's oldest and largest organization of educators, with a current membership of more than 1,700,000 persons. NEA believes that reversal of the lower court's ruling in this case would substantially restrict Title VII protection for public school teachers employed in positions such as coaching, where women may be performing work that is similar to work performed by males, but which a court may not find to be "substantially equal."

The participation of *amici* in this case reflects their belief that women continue to encounter pervasive discrimination in the workplace, including discrimination in rates of compensation. The purpose of Title VII of the 1964 Civil Rights Act was to afford a federal remedy against such discrimination, to women as well as to members of racial and national origin minority groups. This purpose can be realized only by giving the Act a reading consistent with its remedial goals. *Amici* believe that the Ninth Circuit's construction of the Act in this case is consistent with both the statutory language and the legislative purpose and should be affirmed; and that a contrary interpretation could sharply limit progress toward the elimination of sex-based differentials in compensation and terms and conditions of employment.[1]

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[1] The parties' written consents to the filing of this brief are being filed with the Clerk pursuant to Rule 36.2 of the Supreme Court.

## STATEMENT

Respondents, matrons employed by the petitioner County to guard female inmates of the county jail, brought suit under Title VII of the 1964 Civil Rights Act in the United States District Court for the District of Oregon, alleging that they had been discriminated against with respect to compensation because of their sex in that they were not paid the same salary as men who performed the equivalent task of guarding male inmates. The district court found that, although the matrons' jobs may have required as much skill as those of the male guards, the matrons' jobs did not require equal effort or responsibility, since men and women had substantially different workloads. It also held that, if plaintiffs could not establish equality of work under the standards of the Equal Pay Act, they could not prove discrimination under Title VII. (Pet. App. 68-70.)

The court of appeals upheld, as not clearly erroneous, the findings of the district court that the jobs of female matrons and male guards were not equal under the standards of the Equal Pay Act. It held, however, that Title VII was of broader scope than the Equal Pay Act, and that plaintiffs were entitled to prove, if they could, that a portion of the discrepancy between their salaries and that of the male guards could be ascribed only to sex discrimination. *Gunther* v. *County of Washington*, 623 F.2d 1303, 1314 (9th Cir. 1979). On rehearing, in answer to the contention that its decision would reinstate a standard of "comparable worth" which Congress, in adopting the Equal Pay Act, had rejected, the court below specifically noted that the effect of its decision would not be to substitute a "comparable worth" standard for an "equal worth" standard. It said (623 F.2d at 1321):

> Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case

based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. In most cases, an equal work theory will provide the most practical method of establishing a prima facie case of wage discrimination. All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII.

## SUMMARY OF ARGUMENT

The basic question in this case is whether allegations of discrimination against women in compensation because of their sex state a claim under Title VII in the absence of an allegation that men and women occupy similar jobs. Petitioner's position that the Bennett Amendment incorporates into the definition of discrimination the limitations of the Equal Pay Act would mean that, no matter how intentional the lowering of the salary for a job because it was to be occupied by a woman; no matter how deliberate the practice of using different systems for fixing the wages of men's and women's jobs, there can be no remedy for such disparate treatment unless the women involved can demonstrate that equal jobs are filled by men. The court below, like the Third Circuit in *IUE* v. *Westinghouse Elec. Corp.*, 631 F.2d 1094 (3d Cir. 1980), *petitions for cert. filed*, 49 U.S.L.W. 3410 (Nov. 14, 1980), 3456 (Dec. 11, 1980), properly rejected that position.

A. There can be a showing of discrimination in compensation on the basis of sex without a showing of comparable worth of dissimilar jobs under a system of industrial job evaluation. Discrimination would occur if an employer deliberately lowered the salary of a particular job because it was to be filled by a woman, even

if no man occupied a similar position. *See Roesel* v. *Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979).

The use of a system for fixing the compensation of women different from the system used for compensating men, with the inevitable lowering of women's salaries as a result, is discriminatory whether or not men and women occupy equivalent jobs. This Court so recognized in *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978) when it held that it was a violation of Title VII to lower the compensation of women by requiring them to pay more into a pension fund than was required of men. Nowhere in its opinion did the Court find it necessary to discuss whether all jobs were occupied by both men and women; the significant fact was that women as a class were treated differently from men as a class.

While there can be instances of discrimination against individual women in compensation with respect to dissimilar jobs, by and large, where the jobs are not equal, the discrimination is likely to be systemic; *i.e.*, to result from differences in the scale or method by which salaries are fixed for men and for women. There is no reason to attribute to Congress an intention to permit such systemic discrimination against women when it clearly forbade such discrimination against other minorities.

The Equal Pay Act, at the time it was passed, was recognized as being an act of limited scope. Title VII, on the other hand, was a broad statute aimed at eradicating discrimination in employment as a factor in American life. When Congress, which had originally focused on discrimination against blacks and minorities, added sex as a prohibited basis for discrimination, it knew that it was prohibiting all forms of discrimination except for defined exceptions.

B. Section 703(a) makes unlawful "all practices in whatever form which create inequality in employment

due to discrimination on the basis of race, religion, sex or national origin." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976). The Bennett Amendment, which appears in Section 703(h) (relating to defenses), cannot reasonably be read as curtailing the broad definition of unlawful acts in Section 703(a). It permits defenses "authorized" under the Equal Pay Act. The fact that the Equal Pay Act forbids pay differentials only for equal work, with certain exceptions, does not mean that it authorizes discrimination for unequal work. "Authorize" means to establish or approve by authority. The acts authorized by the Equal Pay Act are the exceptions which permit unequal pay for equal work.

The legislative history of the Bennett Amendment does not support the view that the Amendment was intended to limit the definition of discrimination in Section 703 (a). The remarks on which petitioner relies are so equivocal that they do not serve to overcome the normal reading of Section 703(h) as relating to defenses rather than as qualifying the definition of discrimination in Section 703(a).

The early EEOC guidelines on sex discrimination and the opinions of its general counsel, on which petitioner relies, state no more than that the standards for determining what constitutes equal work for the purposes of the Equal Pay Act would be used in determining whether discrimination under Title VII exists where men and women perform "equal work." This does not exclude recognition of discrimination in compensation other than unequal pay for equal work. Nothing in the guidelines or the opinions represents a determination that a system of disparate treatment in fixing the salaries of men and women would not constitute a violation of Title VII. To the contrary, when presented with such a claim, the Commission, under the early guidelines, held that the allegations stated a claim under Title VII.

The only two judicial decisions which have considered the question of the Bennett Amendment in depth are the

decision below and the decision of the Third Circuit in the *IUE* case, *supra*, which is in accord. The opinions on which petitioner relies relate to the sufficiency of proof in the particular case, rather than to the general question of whether there can be proof of discrimination in compensation with respect to different jobs. In many of the cases, the claims were that women were paid less money for doing jobs similar to those filled by men. There was in those cases no proof of intentional sex discrimination because the jobs were filled by women, or that different methods were used to fix the salaries of men and women, or even that gross dissimilarity in pay with respect to similar, even though different, jobs was at least in part attributable to the fact that the jobs were filled by women. The Tenth Circuit, in *Lemons* v. *City of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3250 (Oct. 6, 1980), rejects, as proof of discrimination, a showing of comparable worth of totally dissimilar jobs for which compensation had been fixed by a method which the district court found to be the same for men and women. That decision in no way conflicts with the position of the court below. What is involved here is an allegation of deliberate discrimination against women because of their sex. That states a cause of action under Title VII, even if men and women do not occupy the same or equal positions.

## ARGUMENT

### THERE CAN BE DISCRIMINATION IN COMPENSATION BASED ON SEX UNDER TITLE VII EVEN IF MEN AND WOMEN DO NOT WORK AT EQUAL JOBS

The basic question in this case is whether allegations of discrimination against women in compensation because of their sex, like allegations of discrimination based on national origin or race, state a cause of action under Title VII without the necessity of alleging (and proving) that the women who claim to have been discriminated against

occupied positions equal to those occupied by men. Petitioner's position—that Section 703(h) of Title VII, known as the Bennett Amendment (set out *infra* at 15-16), incorporates the limitations of the Equal Pay Act into the definition of discrimination, rather than setting forth possible defenses to a *prima facie* case—would mean that, no matter how intentional the lowering of wages for particular jobs because they were filled with women; no matter how widespread the practice of using different systems for determining the wages of men's and women's jobs, there can be no remedy for such disparate treatment unless the women involved can demonstrate that substantially equal jobs are filled by men. The court below, like the Third Circuit in *IUE* v. *Westinghouse Elec. Corp.*, 631 F.2d 1094 (3d Cir. 1980), *petitions for cert. filed*, 49 U.S.L.W. 3410 (Nov. 14, 1980), 3456 (Dec. 11, 1980), properly rejected that position. The Bennett Amendment does not define discrimination. Discrimination is broadly defined in Section 703(a). The Bennett Amendment, Section 703(h), which appears in the part of the statute dealing with defenses, is properly interpreted in accordance with its language and position in the statute as relating to defenses to a *prima facie* case of discrimination, not as defining discrimination. How that discrimination is to be proved is a matter not properly before the Court at this time, although we do point out that proof of such discrimination need not rest on proof of comparable worth of dissimilar jobs. All that this Court need decide here is that, under Title VII, there can be discrimination in compensation for women, even though men and women do not occupy jobs which would be deemed equal under the Equal Pay Act.

### A. Allegations of Discrimination in Compensation Based on Sex Do Not Necessarily Require Proof of Comparable Worth of Male and Female Jobs

Petitioner argues this case on the assumption that, if men and women occupy positions which would not be

deemed equal for the purposes of the Equal Pay Act, a claim of discrimination could be proved only by a showing that the jobs of men and women are of comparable worth under a system of industrial job evaluation. On this basis, it devotes a large part of its brief to arguing a proposition which is not involved in the case at all, *i.e.*, that Congress made it clear, at the time it passed the Equal Pay Act, that it did not intend to require all American business to engage in a job evaluation program to determine the comparable worth of dissimilar jobs. Nothing in the position of plaintiffs, and nothing in the opinion of the court below or of the Third Circuit in *IUE* v. *Westinghouse, supra,* would require businesses to engage in job evaluations if they did not choose to do so, or to determine comparable worth of all men's and women's jobs. As the court below pointed out in its opinion on rehearing, this case is not about comparable worth; this case is about discrimination on the basis of sex.

There can be a showing of discrimination in compensation on the basis of sex (or, for that matter, on the basis of race or national origin) without a showing of comparable worth and without evaluations of the jobs involved. Intentional discrimination, for example, could be shown in various ways not involving comparable worth, such as statements by the employer reflecting a belief that women are worth less than men. If an employer were shown to have decided to pay $20,000 to fill a particular position but to have fixed the salary at $18,000 when a qualified black was chosen to fill the position, that would clearly be discrimination in compensation on the basis of race. It would equally be discrimination in compensation on the basis of sex if the decision to pay the lower salary were made because the position was to be filled by a woman. The fact that the job was the only one in the plant would not make the decision to pay the lower salary less discriminatory than if there were two jobs, one filled by a man at the higher salary and one by a woman at

the lower. *See Roesel* v. *Joliet Wrought Washer Co.*, 596 F.2d 183 (7th Cir. 1979).

The use of a system for fixing the compensation of women different from the system used for compensating men, with the inevitable lowering of women's salaries as a result of that method, is discriminatory whether or not men and women occupy equal jobs. This Court so recognized when it held, in *City of Los Angeles* v. *Manhart*, 435 U.S. 702 (1978), that it was a violation of Title VII to lower the compensation of women by requiring them to pay more into a pension fund than was required of men. At no time did the Court or any of the parties find it necessary to discuss the question whether the men and women involved were occupying similar or different positions. The significant fact was that the system did "not pass the simple test of whether the evidence shows treatment of a person in a manner which but for that person's sex would be different.'" 435 U.S. at 711.

There are other examples of discrimination against women in compensation which result from the discriminatory nature of the system used to fix salaries. In *Evans* v. *Central Piedmont Community College*, 475 F. Supp. 114 (W.D.N.C. 1979), the court found discrimination against women as a class by the use of a system of "process management" which in theory provided that women could supervise the work product of other employees without supervising the employees themselves. The court found that this was in fact a method of paying women as clericals for doing work which was in reality supervisory. *See* 475 F. Supp. at 119. In *Christensen* v. *State of Iowa*, 563 F.2d 353 (8th Cir. 1977), where the Eighth Circuit held insufficient a showing that the employer disregarded its own evaluations of male jobs but paid men higher wages to meet the prevailing rate, the court noted that a *prima facie* case of discrimination would have been established if the defendant had paid the prevailing rate to men, but less than the prevailing

rate to women. 563 F.2d at 355 n.5.[2] In other words, the court recognized that the use of a system for fixing the salaries of women different from the system used for men could be discriminatory even if the jobs involved were totally dissimilar.

If an employer chooses to use an industrial evaluation to set salaries and then deliberately sets a lower scale for women than for men, that is clearly discrimination based on sex, whether or not the men's jobs and the women's jobs could be deemed equal for the purposes of the Equal Pay Act. That is what the plaintiffs alleged in *IUE* v. *Westinghouse*, *supra*, and what the Third Circuit properly held they should be allowed to prove if they can. Such a ruling does not, as plaintiffs suggest, require companies to engage in a comparable worth evaluation of dissimilar jobs. It merely requires them to refrain from using different standards for men and women and from deliberately depressing the salaries of certain jobs because they are occupied by women. The fact is that many companies, like Westinghouse, do, for their own purposes, rate jobs. *See, e.g.*, *Kyriazi* v. *Western Elec. Co.*, 461 F. Supp. 894 (D.N.J. 1978). If a company which uses such a system knowingly sets the scale for jobs primarily held by women lower than that used for men, there is no reason why such intentional discrimination on the basis of sex should be any less a violation of Title VII than would be similar disparate treatment based on race or national origin.

By and large, discrimination in compensation with relation to jobs which are not equivalent will involve proof of systemic discrimination, as the examples referred to above illustrate. Where a particular woman claims that she is underpaid because of her sex, it will usually be necessary to show that a male paid a higher salary is in an equivalent position. This is also true where discrimination

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[2] The court regarded it as unnecessary to interpret the Bennett Amendment unless a *prima facie* case of discrimination was shown. It thus treated the Amendment as a defense, not a definition of discrimination.

is alleged to be due to race. See the seminal case of *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 509-510 (E.D. Va. 1968), where, although finding systemic discrimination against blacks as a class, the court found wage discrimination as to particular blacks by comparing their salaries with whites employed in equivalent positions. For the reasons discussed below, we do not believe that the Bennett Amendment necessarily injects, even into an individual claim, the limitations of the Equal Pay Act. If an employer deliberately lowered the salary of a particular job because it was to be occupied by a woman, this would be discrimination based on sex. It would meet the simple test referred to *Manhart, supra*, of showing treatment of a woman in a manner which, except for her sex, would have been different. *See Roesel* v. *Joliet Wrought Washer Co., supra.*

It may also be possible to prove an individual claim in some other fashion. If male and female jobs, although dissimilar for purposes of the Equal Pay Act, are nevertheless very close and the disparity in pay is very great, it could be a reasonable inference that at least some of the difference in salary is due to sex, and not to the difference in jobs. The test, however, would still be discrimination based on sex, not merely difference in pay. The burden of proof would be on the plaintiff to prove the discrimination by whatever means are available. It may be that plaintiffs would choose to offer an expert job evaluation in an endeavor to prove that the pay difference is attributable only to sex, just as plaintiffs and courts rely on statistics to assess other claims of discrimination. *See Teamsters* v. *United States*, 431 U.S. 324 (1977). But this would not impose a job evaluation system on employers. Job analyses are regularly used, even in Equal Pay cases, in an endeavor to establish that jobs are equivalent under the standards of the Equal Pay Act. See *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978); *Wetzel* v. *Liberty Mutual Ins. Co.*, 449 F. Supp. 397, 402 (W.D. Pa. 1978). The use of expert

evidence for such purpose does not run counter to the intent of Congress when it limited the Equal Pay Act to equal jobs. The Equal Pay Act forbids the payment of lower salaries to men and women for equal work regardless of intent. What Congress rejected, when it established the equal work requirement under that Act, was the notion that jobs had to be evaluated to determine whether totally dissimilar jobs were of comparable worth. The fact that job evaluations may be used to prove discrimination under Title VII does not undercut that position. The issue remains discrimination, either intentional or as a necessary result of the disparate method by which salaries are fixed for men and women.

Realistically, however, except for instances of overt, intentional discrimination based on sex, proof of discrimination in compensation based on sex with respect to dissimilar jobs will usually depend on proof of systemic disparate treatment of men and women in the method by which salaries are fixed. There is no reason to attribute to Congress an intention to permit such systemic discrimination against women which it would not permit against blacks.

Petitioner argues that it is not reasonable to attribute to Congress in 1965 an intent to impose on employers a standard of comparable worth which it rejected only a year before in the Equal Pay Act. Title VII does not, however, deal with comparable worth, but with discrimination. The Equal Pay Act, at the time it was passed, was recognized as being an act of limited scope, a "first step" toward the adjustment of balance of pay for women. 109 CONG. REC. 9193 (1963) (remarks of Rep. Bolton). Title VII, on the other hand, was part of a broad attack on discrimination generally as a factor in American life, focused originally on discrimination based on race and national origin. When, therefore, Congress added sex to the prohibited bases for discrimination, it knew that it was prohibiting discrimination against women in all the ways that it was prohibiting discrimination against minorities. The same kind of discrimination against women

as would constitute discrimination against minorities, whether in compensation or otherwise, is a violation of Title VII.

### B. The Bennett Amendment Does Not Limit the Definition of Discrimination but Merely Incorporates the Defenses of the Equal Pay Act

1. *The language of the statute.* As discussed above, there can be discrimination in compensation based on sex even though women work at jobs which are not equal to those occupied by males. Such practices would clearly fall within the interdiction of Section 703(a) of Title VII, which makes it an unlawful employment practice for an employer to discriminate against any individual with respect to compensation, terms or conditions of employment, or to segregate, limit or classify its employees in any way which would affect their status as employees. The language of Section 703(a) indicates as clearly as language can that Congress intended to "prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex or national origin." *Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976).

The Bennett Amendment, Section 703(h) of Title VII, is the last part of an entire section dealing with defenses to a charge of discrimination. It would be a strange reading of a statute to hold that one part of a section relating to defenses limits the broad definition of discrimination defined in Section 703(a), particularly since Section 703(h) relates to only one of the protected classes specified in Section 703(a).

The language of the Bennett Amendment offers no support for this strange interpretation. It provides:

> It shall not be an unlawful employment practice under this Title for any employer to differentiate upon the basis of sex in determining the amount of the

> wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of Section 206(d) of Title 29.[3]

The fact that the Equal Pay Act forbids pay differentials for equal work does not mean that it "authorizes" discrimination for unequal work, any more than the fact that it forbids pay differentials means that it "authorizes" discrimination in the classification or conditions of employment. The Equal Pay Act simply does not reach such discrimination; it does not authorize it. When Title VII broadly outlaws all forms of discrimination, except as authorized by the Equal Pay Act, it obviously refers to the differences which the Equal Pay Act does authorize: the four defenses to unequal payment for equal work.

The ordinary dictionary meaning of the term "authorize" is to establish or approve by authority.[4] Under the usual meaning of the term, a wage differential cannot be "authorized" by the Equal Pay Act unless it is specifically approved by the Equal Pay Act, *i.e.*, unless it comes within one of the four affirmative defenses recognized by the Equal Pay Act.

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[3] Section 206(d) of Title 29, the Equal Pay Act, provides in relevant part:

> No employer having employees subject to any provisions of this section shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the opposite sex in such establishment for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production or (iv) a differential based on any other factor other than sex.

[4] WEBSTER'S SECOND INTERNATIONAL DICTIONARY 186 (1952); RANDOM HOUSE DICTIONARY 100 (1967).

This is the sense in which Congress has repeatedly used the term "authorized". 28 U.S.C. § 1343 provides that the district courts shall have original jurisdiction of "any civil action authorized by law"; plainly, some specific law must provide the basis of a cause of action before the test of § 1343 will be satisfied. *Howell* v. *Cataldi*, 464 F.2d 272, 274-82 (3d Cir. 1972). 18 U.S.C. § 1905 prohibits the disclosure by Federal officials of certain information "to any extent not authorized by law"; plainly, this contemplates that some specific law must approve disclosures of such information if they are to be lawful. *Westinghouse Elec. Corp.* v. *Nuclear Regulatory Comm'n*, 555 F.2d 82, 94 (3d Cir. 1977). To extend the term "authorized" to include any claim or conduct not prohibited by another statute would radically alter the established meaning of these provisions. 28 U.S.C. § 1343 would then allow all civil actions not expressly prohibited by Congress, and 18 U.S.C. § 1905 would then allow all disclosures of information which were not expressly prohibited. Clearly, such a construction would be impermissible.[5]

2. *The legislative history.* As discussed above, discrimination against women in compensation in relation to jobs which are not similar will, in most instances, involve some form of systemic discrimination. It is well to keep this fact in mind in considering the legislative history of the Bennett Amendment because, at the time of the enactment of the Civil Rights Act of 1964, Congress, while endeavoring to eradicate discrimination in employment as a factor in American life, was not really aware of the degree to which discrimination was embodied in systemic, institutionalized form. As the House

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[5] *Cf. Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976):

> . . . the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover.

Committee Report on the proposed 1972 amendments stated (H.R. REP. No. 92-238, 92d Cong., 1st Sess. 8 (1971)):

> During the preparation and presentation of Title VII of the Civil Rights Act of 1964, employment discrimination tended to be viewed as a series of isolated and distinguishable events, due, for the most part, to ill-will on the part of some identifiable individual or organization.
>
> * * *
>
> Employment discrimination, as we know today, is a far more complex and pervasive phenomenon. Experts familiar with the subject generally describe the problem in terms of "systems" and "effects" rather than intentional wrongs.
>
> * * *
>
> It is increasingly obvious that the entire area of employment discrimination is one whose resolution requires not only expert assistance but also the technical perception that a problem exists in the first place, and that the system complained of is unlawful.

Therefore (as we discuss below), while the statements made by various Congressmen in 1965 do not, in and of themselves, support the view of the Bennett Amendment suggested by the petitioner, those statements have even less significance in relation to claims of systemic discrimination against women with respect to compensation. At most they mean only that, where women claim unequal pay for equal work, the standards of the Equal Pay Act apply.

The legislative history is fully covered in part D of the majority opinion of the Third Circuit in *IUE* v. *Westinghouse*, *supra*, 631 F.2d at 1101-05, and extensive discussion here seems unnecessary. The remarks on which petitioners rely are so equivocal that they do not serve to overcome the normal reading of Section 703 (h) as relating to defenses, rather than as qualifying the definition of discrimination in Section 703(a). Sena-

tor Bennett offered his amendment as a "technical objection" to avoid "possible conflict between Title VII and the Equal Pay Act." 110 CONG. REP. 13647 (1964). It is difficult to believe that a drastic limitation on the definition of discrimination, which would have the effect of allowing discrimination against women which would not be allowed against minorities, would have been characterized as a technical objection. It is much more reasonable to accept, as the court below and the Third Circuit did, the remarks of Senator Dirksen that:

> We were aware of the conflict that might develop because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions. All that the pending amendment does is recognize those exceptions, that are carried in the basic act.[6]

Petitioner relies on the remarks of Representative Celler in the House explaining the effect of the Bennett Amendment. He said (110 CONG. REC. 15896 (1964)) that the amendment

> provides that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(b) [*sic*].

The statement cannot be taken as accurate since compliance with the Equal Pay Act would not satisfy the requirements of Title VII with respect to all claims of sex discrimination, including non-monetary claims. It probably reflects the general thinking of the time that discrimination was based on individual acts. In any

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[6] The pre-Bennett Amendment question and answer of April 8, 1964 discussed in the *IUE* opinion shows that Congress understood that Title VII was broader than the Equal Pay Act. The answer stating that the standards in the Equal Pay Act for determining discrimination as to wages were applicable "to the comparable situation under Title VII," 110 CONG. REC. 7217 (1964), relates to situations covered by both acts, i.e., claims of unequal pay for equal work.

event, it is certainly not the kind of clear expression of legislative intent which would serve to overcome the plain meaning of the language used and its position in the statute.

Interpreting the Bennett Amendment as incorporating into Title VII the defenses of the Equal Pay Act does not render the amendment superfluous. Although Section 703 contained exceptions similar to three of the four exceptions of the Equal Pay Act, no one could have been sure, at the time of the enactment of Title VII, that the similar provisions in the two acts would be construed in the same manner. There is some difference in the wording of two of the exceptions, since Section 703 refers to "bona fide" seniority and merit systems while the Equal Pay Act refers simply to seniority and merit systems. Moreover, one of the defenses available under the Equal Pay Act, permitting a differential "based on any other factor other than sex" is not otherwise included in Section 703. Just seven weeks prior to passage of the Bennett Amendment, the Wage-Hour Administrator had issued an extensive elaboration of Equal Pay standards and defenses, including a statement of factors which would establish this defense. 29 Fed. Reg. 5548 (April 24, 1964). As shown by the legislative history of the Equal Pay Act discussed in *Corning Glass Works* v. *Brennan*, 417 U.S. 188 (1974), Congress, when it passed the Equal Pay Act, was aware that some companies were using job evaluation systems which might fairly account for differences in pay for jobs that on the surface appeared to require equal skills. If such evaluations were truly based on a factor other than sex, such differences in pay would be authorized under the Equal Pay Act. For example, the court in *Hodgson* v. *Robert Hall Clothes*, 473 F.2d 589, 593-596 (3rd Cir.), *cert. denied*, 414 U.S. 866 (1973), concluded that economic benefit to the employer was a factor other than sex justifying differences in pay. It is to that kind of defense that the Bennett Amendment relates. Since the prohibi-

tion on discrimination based on sex came late in the development of Title VII, Senator Bennett, as he explained, proposed to avoid a "possible conflict". There was no claim that the drafter of the Amendment, which was offered after cloture had been imposed, had explored in any depth the areas of possible conflict. Hence the existence of some overlap in the various parts of Section 703(h), all relating to defenses, does not militate against the interpretation of the Bennett Amendment as relating to defenses.

3. *The administrative interpretation.* The early EEOC guidelines, and the statements of its general counsel on which petitioner relies (Pet. Br. 89-94), do not undermine the natural reading of the Bennett Amendment as dealing with defenses to a *prima facie* showing of discrimination, rather than as limiting the definition of discrimination in Section 703(a). The 1965 Guidelines on Discrimination Because of Sex (Pet. Br. 80-81) did recognize the need "to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable." Certainly, therefore, the Pay Act standards as to what constitutes equal pay for equal work were then and are now properly held applicable to determining that issue in a Title VII context. The question of what constitutes equal work is, in many situations, subject to different interpretations, as various decisions show. *See, e.g., Corning Glass Works* v. *Brennan, supra*; *Hodgson* v. *Robert Hall Clothes, supra.* These decisions are properly deemed incorporated into Title VII where claims of unequal pay for equal work are asserted. That is what we believe this Court meant by its reference to the Equal Pay Act in *General Elec. Co.* v. *Gilbert*, 429 U.S. 125, 144 (1976).

This is, however, a far cry from saying that, because the equal work standard developed under the Equal Pay Act should be used in determining such claims in Title VII cases, no other form of discrimination can be shown. Nothing in any of the guidelines or opinions under Title

VII on which petitioner relies can fairly be read as a determination that a system of disparate treatment of men and women with respect to compensation, or intentional discrimination on the basis of sex, was not within the coverage of Section 703(a) of Title VII. The Commission recognized from the start that the statutory ban on discrimination in compensation because of sex was coextensive with that of the other prohibitions in Section 703(a), and that Title VII was not limited to those employees covered by the Fair Labor Standards Act. If the Bennett Amendment were held to have permitted any discrimination not expressly forbidden by the Equal Pay Act, then, logically, it should also be said to have authorized unequal payment for equal work in establishments excepted from the Equal Pay Act. The statute has not been and cannot fairly be so read. The fact is that, when the Commission began to be confronted with systemic discrimination, such as situations where different systems were used for the fixing of the salaries of men and women, it did take the position that proof of such allegations would establish violations of Title VII. This was true under the 1965 guidelines, before they were amended in 1972. Case No. 66-5762 (decided June 20, 1968), 1973 CCH EEOC Decisions ¶ 6001 n.22; Decision No. 70-112 (Sept. 5, 1969), 1973 CCH EEOC Decisions ¶ 6108; Decision No. 71-2629 (June 25, 1971), 1973 CCH EEOC Decisions ¶ 6300.

4. *Judicial decisions.* The only two cases which have examined in depth whether the Bennett Amendment limits the definition of discrimination, so as to permit employers intentionally to set lower compensation rates for women because of their sex, are the decision below and the decision of the Third Circuit in *IUE* v. *Westinghouse, supra.* In *Laffey* v. *Northwest Airlines, Inc.*, 567 F.2d 429, 446 (D.C. Cir. 1976), *cert. denied*, 434 U.S. 1086 (1978), the court indicated its view that "a sex-predicated wage differential is immune from attack under Title VII only if it comes within one of the four enu-

merated exceptions to the Equal Pay Act", but the court found it unnecessary to decide the Title VII compensation claim since it found a violation of the Equal Pay Act.

The cases on which petitioner relies holding, in the words of *Ammons* v. *Zia Co.*, 448 F.2d 117, 120 (10th Cir. 1971), that "to establish a case of discrimination under Title VII, one must prove a differential in pay based on sex for performing 'equal' work" are not really contrary to the position of the court below and the Third Circuit. The courts in all the cases relied on were dealing with the sufficiency of proof, not with the more general question of whether there ever can be any actionable discrimination in compensation (including intentional lowering of salary because of sex) without a showing that men and women occupy equal jobs. As noted above, in many cases—particularly those involving individual, as distinct from systemic, claims—an allegation of discrimination in compensation will require a showing that there has been unequal pay for equal work under the standards of the Equal Pay Act. That was the claim in *Ammons* which the court found not proved. There was no attempt in *Ammons*, or in most of the other cases relied upon by petitioner, to prove intentional sex discrimination, or different methods used in the fixing of men's and women's salaries, or even that the dissimilarity in pay with respect to similar albeit unequal jobs was so gross as to be attributable, at least in part, only to the fact that the jobs were filled by women. In *Stastny* v. *Southern Bell Tel. Co.*, 628 F.2d 267 (4th Cir. 1980), the court (after ruling that the case had been improperly treated as a class action) found that the complainants, although improperly denied promotion, had not shown that their individual salaries were unequal to those of men in similar positions. Since the court found that state-wide statistical evidence was not properly applicable to the particular plant at issue (628 F.2d at 279), it had no occasion to consider whether claims that

women as a class were discriminated against in salaries could be proved by comparison of average female earnings with average male earnings within broad salary classifications. *Cf. Arkansas Educ. Ass'n* v. *Board of Educ.*, 446 F.2d 763 (8th Cir. 1971), where the court found relevant to a claim of salary discrimination based on race the fact that no black school teacher had been awarded a salary as high as a white school teacher. In *Lemons* v. *City of Denver*, 620 F.2d 228 (10th Cir. 1980), *cert. denied*, 49 U.S.L.W. 3250 (Oct. 6, 1980), the Tenth Circuit held that plaintiffs had not proved sex discrimination by an attempted showing of comparable worth of totally dissimilar jobs, where the district court specifically found that men and women were treated in the same fashion. This is certainly not a holding that, where men and women are treated differently, there cannot be discrimination merely because they work at different jobs. As discussed above, the implications of this Court's decision in *City of Los Angeles* v. *Manhart* are clearly to the contrary.

In sum, nothing in the legislative history or administrative or judicial interpretations of the Bennett Amendment lends support to the position of petitioner that proof that men and women perform equal work is a necessary ingredient of any claim of sex discrimination in compensation under Title VII. All that this Court is called upon to decide in this case is that to state a cause of action under Title VII, a claimant need not allege that men and women occupy equal jobs. Whether, and how, where the jobs are unequal, the claimants can prove their claim of sex discrimination, are issues not presently before this Court. It is enough to recognize that proof of such allegations need not inevitably, as petitioner claims, rest on proof of comparable worth; that there are other means of showing intentional or systemic treatment of men and women with respect to compensation. Such disparate treatment of women is discrimination, as would

be equivalent disparate treatment of racial and ethnic minorities. Allegations of such discrimination therefore state a claim under Title VII.

## CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted,

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No. 80-429

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# In the Supreme Court of the United States

OCTOBER TERM, 1980

THE COUNTY OF WASHINGTON, AND SHERIFF WARREN BARNES, IN HIS CAPACITY AS SHERIFF OF WASHINGTON COUNTY, PETITIONERS

*v.*

ALBERTA GUNTHER, ET AL.

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE


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## BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE

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### QUESTION PRESENTED

Whether the Equal Pay Act "authorizes" sex-based compensation discrimination, except where women can show that men are paid more for "equal" jobs, and thus precludes women, unlike other persons protected by Title VII of the Civil Rights Act of 1964, from seeking relief from compensation discrimination under Title VII, unless the particular discriminatory practice also violates the narrow prohibition of the Equal Pay Act.

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## INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

The Equal Employment Opportunity Commission is charged with the administration, interpretation, and enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, and the Equal Pay Act of 1963, 29 U.S.C. 206(d). See Reorg. Plan No. 1 of 1978, 43 Fed. Reg. 19807 (1978); Exec. Order No. 12067, 43 Fed. Reg. 28967 (1978); Exec. Order No. 12144, 44 Fed. Reg. 37193 (1979). The Department of Justice also has important enforcement responsibilities under Title VII, and the Department of Labor retains enforcement responsibilities under other provisions of the Fair Labor Standards Act of 1938, 29 U.S.C. 201 *et seq.*, to which the Equal Pay Act was added by Congress. This case presents the question whether the Equal Pay Act precludes women, unlike other classes protected by Title VII, from seeking relief under Title VII against employers who discriminate by evaluating and compensating employees on the basis of sex, unless the discrimination would also violate the narrow prohibition contained in the Equal Pay Act.

## STATEMENT

Respondents, four women who were previously employed as jail matrons by the County of Washington, Oregon, brought this employment discrimination action in the United States District Court for the District of Oregon, alleging that petitioners, the county and its sheriff, violated respondents' rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.* Respondents alleged that "[i]n their employment * * * as jail matrons, [they] received lower compensation than male employees performing substantially the same services" (C.A. App. 2).[1] Based on the record developed

[1] Under state law, guards responsible for female prisoners must be women (Pet. App. 71a, 75a n.9). Although there is no analogous

during pretrial proceedings and at trial, the district judge understood this allegation to encompass two distinct claims. First, respondents claimed that the men's and women's jobs, although equal in skill, effort, and responsibility, were not compensated equally. The court said (Pet. App. 67(a); footnote omitted):

> The matrons contend that their jobs were substantially equal to those of the [male] deputy sheriffs and the [male] corrections officers. The County contends that there were significant differences between the men's and women's jobs and that those differences accounted for the salary differentials.

Alternatively, respondents claimed that even if their jobs were not precisely equal in terms of skill, effort, and responsibility, the county had nonetheless violated Title VII by setting matrons' wages at a depressed level because of respondents' sex.[2] The district court also summarized this claim (*id.* at 69a):

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requirement with respect to guards responsible for male prisoners (*id.* at 23a, 60a), it appears that such jobs have always been held by men. Until 1973, the task of guarding male prisoners was performed by "deputy sheriffs"; thereafter, the task was performed by "corrections officers" (*id.* at 60a-61a, 67a). The monthly pay range for these employees immediately before and after February 1, 1973, is as follows (*id.* at 61a):

| | Before Feb 1, 1973 | Effective Feb. 1, 1973 |
|---|---|---|
| Deputy Sheriffs | $668-853 | $736-940 |
| Deputy Sheriff Recruits | 636-736 | 701-812 |
| Corrections Officers | - | 701-896 |
| Corrections Officer Trainees | - | 668-812 |
| Matrons | 476-606 | 525-668 |

[2] Petitioner Barnes, the county sheriff, testified at trial that the difference in pay was greater than that which could be justified by the difference in job duties (Tr. 56-58, 68-69). Because the district court thought that information irrelevant as a matter of law (Pet. App. 70a), respondents were apparently precluded from fully developing the record with respect to their second claim. Thus, the court of appeals found that further proceedings might be necessary on remand (*id.* at 18a-19a, 39a, 55a n.11).

> The matrons contend * * * that even if the men's jobs were more difficult, the differences in pay were much greater than the differences in the difficulty of the work. The matrons contend that some of the differences in pay can be explained only by the existence of sex discrimination.

In evaluating respondents' first claim, the court applied the "equal work" standard of the Equal Pay Act, 29 U.S.C. 206(d), which it found controlling with respect to equal pay claims brought under Title VII. The district court found that the men's and women's jobs were not equal because, although they were equal in skill, they were not equal in terms of effort or responsibility. The court found that the matrons guarded fewer prisoners and devoted a substantial amount of time to clerical duties (Pet. App. 59a-60a, 67a-69a). Thus, the court dismissed respondents' first claim for lack of proof (*id.* at 68a-69a).

The court then dismissed respondents' second claim, which it found insufficient as a matter of law. The court held (*id.* at 70a):

> If the jobs are substantially dissimilar, that is the end of the inquiry. *See* 29 C.F.R. § 800.120 (1965). Under these circumstances, the overpayment of corrections officers or the underpayment of matrons are not matters which I can either explore or correct.

The district court therefore entered judgment for petitioners.[3]

The court of appeals reversed the district court's dismissal of respondent's second compensation claim, but affirmed the judgment in all other respects (Pet. App. 20a-56a). While recognizing that the Equal Pay Act prohibits only one type of discrimination, the payment of

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[3] In addition to their compensation claims, respondents alleged that petitioners had also violated Title VII by terminating their employment in retaliation for their demands for equal pay. See C.A. App. 2. The district court concluded that the evidence did not support that allegation (Pet. App. 70a-73a), and the court of appeals affirmed (*id.* at 39a-49a). That issue is not presented here.

unequal wages for equal work, the court of appeals noted that the prohibition of Section 703(a) of Title VII is "much broader" (*id.* at 32a). The court reasoned that the standards of the Equal Pay Act must apply when "equal work" claims are brought under Title VII, but that the Equal Pay Act would not apply to other compensation claims unless, as petitioners contended, the contrary result was required by the so-called Bennett Amendment, the second sentence of Section 703(h) of Title VII (*id.* at 31a-32a). The court therefore examined the language and legislative history of the Bennett Amendment, concluding that the amendment "incorporat[ed] the Equal Pay Act's four affirmative defenses, but not its equal work standard" (*id.* at 33a). Thus, the court of appeals held that respondents were entitled to prove, if they could, that a portion of the discrepancy between their salaries and those of their male counterparts could be ascribed only to sex discrimination, and the case was remanded for that purpose (*id.* at 38a-39a).

On denial of rehearing, the court further clarified its holding (Pet. App. 17a):

> Where a Title VII plaintiff, claiming wage discrimination, attempts to establish a prima facie case based solely on a comparison of the work she performs, she will have to show that her job requirements are substantially equal, not comparable, to that of a similarly situated male. The standards developed under the Equal Pay Act are relevant in this inquiry. In most cases, an equal work theory will provide the most practical method of establishing a prima facie case of wage discrimination. All we hold here is that a plaintiff is not precluded from establishing sex-based wage discrimination under some other theory compatible with Title VII.

## SUMMARY OF ARGUMENT

This case presents an important question involving the proper relationship of two federal statutes that were enacted by Congress to protect women against employment discrimination. The question presented is whether

the Equal Pay Act of 1963, 29 U.S.C. 206(d), "authorizes" all types of sex-based compensation discrimination except that practice expressly prohibited by the Act —the payment of unequal wages because of sex for equal work in establishments covered by the Fair Labor Standards Act—and thus precludes women, unlike other persons protected by Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, from invoking Title VII against any type of compensation discrimination that does not violate the narrow prohibition of the Equal Pay Act. As the Third Circuit has suggested, the ultimate issue for decision is straightforward: "whether Congress intended to permit [an employer] to willfully discriminate against women in a way in which it could not discriminate against blacks or whites, Jews or Gentiles, Protestants or Catholics, Italians or Irish, or any other group protected by [Title VII]." *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Electric Corp.*, 631 F.2d 1094, 1097 (1980), petitions for cert. pending, Nos. 80-781 (filed Nov. 14, 1980) and 80-944 (filed Dec. 11, 1980). The answer to this question is equally straightforward. There is no basis in the language or legislative history of Title VII for concluding that Congress intended, with respect to women, to limit the comprehensive protection afforded by that statute merely because the Equal Pay Act protects women against a particular type of compensation discrimination in particular circumstances.

The language of Title VII could not more clearly prohibit all forms of compensation discrimination based on race, color, religion, sex, and national origin. Section 703(a)(1) of Title VII, 42 U.S.C. 2000e-2(a)(1), prohibits employers from discriminating "against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of * * * race, color, religion, sex, or national origin." Likewise, Section 703(a)(2) of Title VII, 42 U.S.C. 2000e-2(a)(2), provides that it shall be unlawful for an employer "to limit, segregate, or classify his employees * * * in any way which would deprive or tend to deprive any

individual of employment opportunities or otherwise adversely affect his status as an employee, because of * * * race, color, religion, sex, or national origin."

Petitioners seek to avoid the obvious force of this language, however, by asserting that compensation claims by women have an inferior status under Title VII because of the so-called Bennett Amendment, which provides that, "[i]t shall not be an unlawful employment practice * * * for any employer to differentiate on the basis of sex in determining the amount of wages or compensation paid * * * to employees * * * if such differentiation is authorized by the provisions of section 206(d) of title 29." Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h). The Equal Pay Act of 1963, 29 U.S.C. 206(d), in turn provides that, "[n]o employer * * * shall discriminate, within any establishment * * *, between employees on the basis of sex by paying wages in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work on jobs the performance of which requires equal skill, effort and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex."

It is clear that the scope and effect of the Bennett Amendment must be ascertained by determining what differentiations are "*authorized* by the provisions of section 206(d) of Title 29" (Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h) (emphasis added)). The answer appears on the face of the statute: differentiations in pay for equal work are authorized if they may be justified under one of the four enumerated exceptions of the Equal Pay Act.

Congress adopted the Bennett Amendment because it recognized that claims actionable under the Equal Pay Act might also be brought under Title VII. In those circumstances, Congress intended that employers not be de-

prived of the affirmative defenses provided by the earlier statute. The proponents of Title VII recognized that the standards of the Equal Pay Act would apply, by virtue of the doctrine of in pari materia, to equal work claims brought under Title VII. Initially, they explicitly provided that some, but not all, of the exceptions of the Equal Pay Act would apply to Title VII compensation claims. By adopting the Bennett Amendment, Congress assured that all of those exceptions would be applicable in such cases.

There is no basis for petitioners' contention that Congress intended, when it adopted the Bennett Amendment, to "authorize" all sex-based discrimination that was not expressly prohibited by the Equal Pay Act. Petitioners' construction would eviscerate the integrity of Title VII by making one principle applicable to claims based on sex, while another principle would apply to claims based on all other unlawful classifications. Nothing in the legislative history suggests that intention. Indeed, the history of the Bennett Amendment shows that it was proposed and adopted as a "technical" amendment, which hardly supports petitioners' assertion that the amendment was intended to alter the fundamental concept of discrimination contained in Section 703(a) of Title VII. Moreover, Senator Bennett proposed the amendment, and it was accepted, as an amendment to Section 703(h), a section that deals only with defenses, not with definitions of actionable discrimination.

Under petitioners' view, Title VII claims by women alleging sex-based compensation discrimination would not be actionable unless the plaintiffs could show that men and women held equal jobs. If that view were correct, the result would be anomalous: women would be afforded something less than the comprehensive protection afforded by Title VII simply because Congress had previously provided partial protection for them against a particular form of discrimination. Women would thus have no remedy, as the Ninth Circuit correctly noted (Pet. App. 54a n.9), in the face of the most unvarnished discrimination:

> Assume for example, that an employer tells a female worker, not employed at a position that is substantially equal to that performed by a male, that he would pay her $30 a week more if she was male. For want of a male counterpart performing equal work, such blatant discrimination would not be prohibited by the Equal Pay Act. * * * We find no indication, however, that the Bennett Amendment was intended to legalize such practices under Title VII.

## ARGUMENT

### I. Section 703(a) Of Title VII Prohibits All Forms Of Discrimination In Compensation Based On Race, Color, Religion, Sex, Or National Origin

Section 703(a) of Title VII, 42 U.S.C. 2000e-2(a), is unequivocal in its prohibition of all forms of discrimination in the evaluation and compensation of jobs. Section 703(a)(1) of Title VII provides that it shall be unlawful "to discriminate against any individual with respect to his compensation, terms, conditions or privileges of employment because of * * * race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(1). Likewise, Section 703(a)(2) of Title VII provides that it shall be unlawful "to limit, segregate or classify * * * employees * * * in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of * * * race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2(a)(2). The language of Section 703(a) leaves no room for doubt concerning Congress' intention to proscribe every form of invidious discrimination in employment, and to do so fully with respect to each of the classes protected by Title VII.[4] As this Court said in

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[4] Petitioners apparently suggest (Pet. Br. 42-45) that the prohibition against sex discrimination should be construed more narrowly than the other provisions of Section 703(a) because this prohibition was added by an opponent of Title VII who thereby sought to undermine support for the legislation (Pet. Br. 43). Whatever the merits of that factual assertion (see Kanowitz, *Sex-Based Discrimination in American Law III: Title VII of the 1964 Civil*

*Franks* v. *Bowman Transp. Co.*, 424 U.S. 747, 763 (1976), "Congress intended to prohibit all practices in whatever form which create inequality in employment opportunity due to discrimination on the basis of race, religion, sex, or national origin, * * * and ordained that its policy of outlawing such discrimination should have the 'highest priority' * * *."

That Section 703(a) protects women against compensation discrimination to the same extent that other classes are protected was made clear in *Los Angeles Dep't of Water & Power* v. *Manhart*, 435 U.S. 702 (1978). In *Manhart*, the Court held that Section 703(a) prohibited an employer from deducting from the paychecks of female workers a pension fund contribution which exceeded that deducted from the paychecks of men, thus reducing the take-home-pay of all women. Noting that "a statute that was designed to make race irrelevant in the employment market * * * could not reasonably be construed to permit a take-home-pay differential based on a racial classification" (*id.* at 709; footnote omitted), the Court found no basis for concluding that a different result should obtain simply because the discrimination was based on sex rather than race. The Court said (*id.* at 708-709):

> The statute's focus on the individual is unambiguous. It precludes treatment of individuals as simply com-

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*Rights Act and the Equal Pay Act of 1963*, 20 Hastings L.J. 305, 310-312 n.30 (1968); Gitt & Gelb, *Beyond The Equal Pay Act: Expanding Wage Differential Protections Under Title VII*, 8 Loy. U.L.J. 723, 743-745 (1977)), the secret motivation of the congressman who offered the amendment is certainly irrelevant in ascertaining what Congress as a whole intended when it added this prohibition to the statute. Indeed, several members of Congress emphasized the great need to protect women against discrimination. See, *e.g.*, 110 Cong. Rec. 2578 (1964) (remarks of Rep. Bolton); *id.* at 2578-2580 (remarks of Rep. Griffiths); *id.* at 2580-2581) (remarks of Rep. St. George); *id.* at 2582 (remarks of Rep. May); *id.* at 2582-2583 (remarks of Rep. Kelly). At all events, petitioners' argument comes too late in the day. *Los Angeles Department of Water & Power* v. *Manhart*, 435 U.S. 702, 709, 711 (1978).

> ponents of a racial, religious, sexual, or national class. If height is required for a job, a tall woman may not be refused employment merely because, on the average, women are too short. Even a true generalization about the class is an insufficient reason for disqualifying an individual to whom the generalization does not apply. * * *
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> * * * * * *
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> [T]he question of fairness to various classes affected by the statute is essentially a matter of policy for the legislature to address. Congress has decided that classifications based on sex, like those based on national origin or race, are unlawful.

The Court held that the employer's practice did "not pass the simple test of whether the evidence shows 'treatment of a person in a manner which but for that person's sex would be different' " (435 U.S. at 711).

Not only did the Court in *Manhart* fail to perceive any principled distinction between claims based on sex and those based on race, but the Court did not find it necessary to determine whether the women who were disadvantaged by the discriminatory practice held jobs "equal" to those held by men. Although petitioners' theory appears not to have been urged in *Manhart*, the result reached in that case is inconsistent with petitioners' view.

When Congress enacted Title VII, it recognized that discrimination, which takes many forms, may be sophisticated or simple-minded. See *McDonnell-Douglas Corp.* v. *Green*, 411 U.S. 792, 801 (1973). The broad language of Section 703(a) was designed to cast a net as broad as the evil that Congress sought to eradicate. In terms, Section 703(a) prohibits all forms of discrimination, including compensation discrimination, whether based on race, color, religion, sex or national origin.[5] If, for ex-

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[5] Petitioners suggest (Pet. Br. 41) that the purposes of Title VII will be satisfied if women are protected only against discrimination in transfers and promotions. But such opportunities may not always exist and some women, although qualified for the underpaid jobs that they presently hold, may not have the skills necessary to secure other employment. That women may theoretically be able to move to jobs in which sex-based compensation practices

ample, an employer chose to award cost of living increases to white employees, but not to blacks, that discrimination undoubtedly would violate Section 703(a), without regard to the specific duties performed by the two classes. Likewise, if an employer were to define the qualifications for a unique job and set the yearly salary for that job at $15,000, and then reduce the salary to $10,000 when a qualified black was found, that discrimination would also violate Section 703(a), notwithstanding the uniqueness of the job. Finally, the use of two systems for fixing compensation, with one applicable to blacks and another applicable to whites, resulting in categorically inferior wages for blacks, would also violate Section 703 (a), without regard to whether blacks and whites were doing "equal" work. See *Quarles* v. *Philip Morris, Inc.*, 279 F. Supp. 505, 509-510 (E.D. Va. 1968).[6] Similar

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are not present is irrelevant inasmuch as Section 703(a) prohibits discrimination not only in promotions and transfers, but also in compensation.

[6] Petitioners argue, as a policy matter (Pet. Br. 98-109), that Title VII should be construed to allow women to challenge only that form of compensation discrimination that would also violate the Equal Pay Act because the federal courts would otherwise be required to resolve difficult questions that they are ill-equipped to decide. However, as amicus AFL-CIO-CLC points out (Br. 16 n.7), questions of similar kind and difficulty were routinely decided by the National War Labor Board. We would also point out that the precise manner in which compensation claims are to be proved is not presently before the Court. The issue here is whether such claims are actionable. As amicus Lawyers' Committee correctly notes (Br. 9-15), however, such claims need not rest, as petitioners would have the Court believe (Pet. Br. 99-104), on proof of comparable worth of dissimilar jobs. At all events, petitioners' argument sweeps too broadly because it would logically apply with equal force to analogous claims brought by members of other protected classes, which the Bennett Amendment provides no basis for precluding. See *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Corp., supra*, 631 F.2d at 1097, 1100 n.7. Finally, there is no basis for petitioners' assertion (Pet. Br. 102) that the decision below will result in "a torrent of litigation." The reported decisions show that few women or other persons protected by Title VII have brought such claims in the past, and, as the Ninth Circuit noted (Pet. App. 39a), "problems

historical practices of discrimination against women have been documented. See *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Corp., supra*, 631 F.2d at 1097-1098.

On its face, Section 703(a) prohibits the same types of discrimination when practiced against women (see Pet. App. 54a n.9),[7] but petitioners' theory would provide no relief to women in such circumstances unless they could prove that their jobs were "equal" to those held by the men who were the beneficiaries of the employer's discrimination.[8] Petitioners' theory is thus inconsistent with the basic purpose of Title VII, and, as we shall now show, there is no reason to believe that Congress intended such a result.

## II. The Bennett Amendment Does Not Preclude Women From Seeking Relief Under Title VII For Forms Of Compensation Discrimination That Would Not Also Violate The Equal Pay Act

Petitioners contend that the Bennett Amendment, the second sentence of Section 703(h), 42 U.S.C. 2000e-2(h), should be construed to preclude women, unlike other protected classes, from invoking Title VII against any form of compensation discrimination that would not also violate the Equal Pay Act. The court below properly rejected that far-reaching contention (Pet. App. 2a-16a,

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of proof may present substantial barriers to establishing this kind of discriminatory compensation claim." Although aggrieved persons may generally be reluctant to face those barriers, "[s]uch problems * * * are not sufficient reasons to foreclose * * * the opportunity to establish a claim of discrimination" (*ibid.*).

[7] Moreover, when Congress amended Title VII in 1972, it confirmed its intent to proscribe all forms of compensation discrimination against women, not merely that which was the most obvious. See H.R. Rep. No. 92-238, 92d Cong., 1st Sess. 4-5 (1971); S. Rep. No. 92-415, 92d Cong., 1st Sess. 7 (1971).

[8] The practical implications of petitioners' theory are suggested by the fact that a substantial part of the female workforce is employed in jobs that are largely filled by women. See Gitt & Gelb, *Beyond The Equal Pay Act: Expanding Wage Differential Protection For Women Under Title VII*, 8 Loy. U.L.J. 723, 725 & nn.12-14 (1977).

30a-39a), which is supported by neither the language nor the legislative history of the Bennett Amendment.[9]

### A. *The Language of the Bennett Amendment*

The Bennett Amendment addresses the relationship between that which is "authorized" by the Equal Pay Act and that which Title VII prohibits (Section 703(h) of Title VII, 42 U.S.C. 2000e-2(h)):

> It shall not be an unlawful employment practice under [Title VII] for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of [the Equal Pay Act].

The language of the amendment is plain and unambiguous: Employers may engage in any practice "authorized" by the Equal Pay Act, without violating Section 703(a) of Title VII. Thus, the question presented turns upon a determination of what practices are "authorized" by the Equal Pay Act.

The Equal Pay Act provides (29 U.S.C. 206(d)):

> No employer * * * shall discriminate, within any establishment * * * between employees on the basis of sex by paying wages to employees * * * at a rate less than the rate at which he pays wages to employees of the opposite sex * * * for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions, except where such payment is made pursuant to (i) a seniority system; (ii) a merit system; (iii) a system which

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[9] Petitioners' contention has also been rejected by the Third Circuit. See *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Corp., supra*, 631 F.2d at 1099-1108. Although petitioners contend (Pet. Br. 94-98) that that decision and the decision below in this case conflict with the decisions of other courts of appeals, that conflict is illusory, as the Third Circuit correctly noted (631 F.2d at 1106-1107), because the issue presented here was not presented or decided in those cases. See also amicus Lawyers' Committee Br. 22-24.

> measures earnings by quantity or quality of production; or (iv) a differential based on any other factor other than sex * * *.

Thus, by its terms, the Equal Pay Act does not "authorize" particular compensation practices. The scheme of the Act is to prohibit specific conduct—the payment of unequal wages, based on sex classification, to persons working in an establishment covered by the Fair Labor Standards Act and doing equal work requiring equal skill, effort, and responsibility, under similar working conditions—and then to sanction or except that conduct from the prohibition in four circumstances.

The common meaning[10] of "authorize" is "endorse, empower, justify * * * sanction * * *." *Webster's Third New International Dictionary* 146 (1976 ed.). Thus, "[a]uthorize indicates endowing formally with a power or right to act * * *" (*id.* at 147). To use the word "authorized" properly in the present context, one would have to say that the Equal Pay Act prohibits the particular practice of paying unequal wages for equal work, but that the prohibited practice is "authorized" or sanctioned when one of the four exceptions applies. Construing the Equal Pay Act and the Bennett Amendment together,

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[10] The words of a statute must be afforded their ordinary meaning in the absence of persuasive evidence to the contrary. *Perrin* v. *United States*, 444 U.S. 37, 42 (1979); *Burns* v. *Alcala*, 420 U.S. 575, 580 (1975); *Banks* v. *Chicago Trimmers Ass'n*, 390 U.S. 459, 465 (1968); *Caminetti* v. *United States*, 242 U.S. 470, 485-486 (1917). Contrary to petitioners' contention (Pet. Br. 70-73), this well-established principle of statutory construction does not make "a fortress out of the dictionary." As the Court noted in *Ernst & Ernst* v. *Hochfelder*, 425 U.S. 185, 199 n.19 (1976), "legislation when not expressed in technical terms is addressed to the common run of men and is therefore to be understood according to the sense of the thing, as the ordinary man has the right to rely on ordinary words addressed to him." Moreover, "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover." *Chandler* v. *Roudebush*, 425 U.S. 840, 848 (1976). See generally, 2A C. Sands, *Sutherland Statutory Construction* §§ 45.08, 47.28 (4th ed. 1973).

therefore, one must conclude that the Equal Pay Act "authorizes" four exceptions to its prohibition, and the Bennett Amendment thus incorporates those exceptions within Section 703(h) of Title VII as defenses to similar claims under that title.[11]

Petitioners do not discuss the meaning of the word "authorize," but their construction of the Equal Pay Act suggests that all compensation practices that are not explicitly prohibited by the Act are "authorized" by the Bennett Amendment. On that theory, the Bennett Amendment would "authorize" every kind of sex-based compensation discrimination involving employees who are either not performing "equal" work (29 U.S.C. 206(d)), or are performing "equal" work in different "establishment[s] of the same employer (*ibid.*) or in jobs exempted from the coverage of the Fair Labor Standards Act (see 29 U.S.C. 213).[12] Petitioners' theory clearly proves too much because it defies common sense to suggest that Congress, by prohibiting a specific practice, subject to enumerated exceptions, thereby intended sub silentio to authorize every conceivable practice similar to that which is prohibited (including practices prohibited by Congress in other legislation).[13]

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[11] This construction of the statutory language is supported by the Court's decision in *Los Angeles Department of Water & Power* v. *Manhart*, *supra*, 435 U.S. at 712 n.23, in which the Court said, "[w]e need not decide whether retirement benefits or contributions to benefit plans are 'wages' under the [Equal Pay] Act, because the Bennett Amendment extends the Act's four exceptions to all forms of 'compensation' covered by Title VII."

[12] As we have shown (pages 9-10, *supra*), that result is inconsistent with the Court's decision in *Los Angeles Department of Water & Power* v. *Manhart*, *supra*.

[13] Even if other specific practices were addressed but not expressly prohibited by the statute, it would nonetheless be erroneous to suggest that such practices were thereby "authorized." For example, Title II of the Civil Rights Act of 1964, the public accommodations provision, expressly states that its "provisions * * * shall not apply to a private club or other establishment not in fact open to the public * * *." 42 U.S.C. 2000a(e). One would not be justified, however, in stating that Title II thereby "authorizes"

Moreover, if the purpose of the Bennett Amendment was, as petitioners contend, to narrow the definition of compensation discrimination under Section 703(a), by excluding those women's compensation claims that were not also actionable under the Equal Pay Act, it is difficult to see why the Bennett Amendment was proposed and adopted as an amendment to Section 703(h), a section that deals narrowly with certain defenses.[14] If that had

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discriminatory practices by such clubs. Similarly, Title VII provides that it does not reach employers with fewer than 15 employees (42 U.S.C. 2000e(b)), but it would not be accurate to state that Title VII "authorizes" discriminatory practices by such employers. Where Congress has considered a problem of some breadth and complexity, such as employment discrimination, and has legislated only with respect to a particular part of the problem, there is no justification for asserting that Congress has "authorized" that which it has merely failed to prohibit.

A similar question was presented in *Chrysler Corp.* v. *Brown*, 441 U.S. 281 (1979), in which the Court was required to construe the Trade Secrets Act, 18 U.S.C. 1905, which prohibits government employees from disclosing trade secrets unless such disclosures are otherwise "authorized by law." The Court rejected the contention of the Office of Federal Contract Compliance Programs that its statutory authority to collect trade secrets information impliedly authorized its disclosure: "[U]nless we were to hold that any federal statute that implies some authority to collect information must grant *legislative* authority to disclose that information to the public, it is simply not possible to find in these statutes a delegation of the disclosure authority asserted * * * here" (441 U.S. at 306; emphasis in original).

[14] The various provisions of a section are generally construed as dealing with the same subject matter. See *Neal* v. *Clark*, 95 U.S. 704, 708-709 (1877). The first sentence of Section 703(h) narrows the scope of claims and excludes certain proof, but it does not deprive any protected class of any particular claim that might be brought under Section 703(a). Unlike petitioners' theory, our construction of the Bennett Amendment permits both sentences to be read as addressing the same subject matter. Petitioners' assertion (Pet. Br. 73-75) that this construction of the Act creates redundancy in the two sentences is without merit. The exceptions contained in the two sentences are similar, but not identical. For example, the first sentence provides an exception for "a bona fide seniority or merit system * * * provided that * * * differences are not the result of an intention to discriminate because of * * * sex

been Congress' intent, it would have been far easier (and clearer) to amend Section 703(a) to modify the general prohibition against compensation discrimination by providing that sex-based compensation discrimination was unlawful only if it also violated the Equal Pay Act. Likewise, Congress could have amended Section 703(e) of Title VII, which exempts from coverage certain class-based differentiations, including sex-based differentiations where sex is a bona fide occupational qualification. Congress could have provided there that sex-based compensation differentiations would not constitute actionable discrimination under Title VII unless they also violated the Equal Pay Act.

**B. *The Legislative History of the Bennett Amendment***

Although the legislative history of the Bennett Amendment is neither extensive nor wholly devoid of ambiguity,[15] it generally supports the view that the word "authorize" should be given its common meaning, thus including within Section 703(h) the four exceptions con-

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* * *." The second sentence provides an exception for "a seniority system" and "a merit system" without additional qualification. Moreover, the final exception provided by the second sentence is far broader than any exception contained in the first sentence. See pages 20-21, *infra*.

[15] To the extent that the legislative history is ambiguous, it "should not be permitted to control the customary meaning of words." *NLRB* v. *Plasterers Local Union No. 79*, 404 U.S. 116, 129 n.24 (1971). Because the meaning of the word "authorized" is clear on its face, and that meaning is consistent with the fundamental remedial policy of Title VII, exceptionally strong evidence of a contrary legislative intent would be required to establish that the Bennett Amendment immunizes intentional sex-based compensation discrimination. Such evidence is not present here, where the legislative history consists entirely of floor debate (see 2A C. Sands, *Sutherland Statutory Construction* § 48.13 (4th ed. 1973)), and Senator Bennett later characterized his own remarks, upon which petitioners mainly rely, as having created "confusion" (111 Cong. Rec. 13359 (1965)). The legislative history was fully considered by the court below (Pet. App. 3a-19a) and by the Third Circuit in *International Union of Electrical, Radio and Machine Workers, AFL-CIO-CLC* v. *Westinghouse Corp., supra*, 631 F.2d at 1099-1105. Neither court found any support for petitioners' view.

tained in the Equal Pay Act. Senator Bennett offered his amendment on the Senate floor on June 16, 1974, after cloture had been invoked. The discussion of the Bennett Amendment was thus necessarily brief. Nonetheless, the statements of Senators Bennett, Humphrey, and Dirksen all show that the amendment was viewed as a "technical" amendment designed to dispel any uncertainty that might exist because of the fact that Section 703(h), prior to the adoption of the Bennett Amendment, contained exceptions that were similar to, but neither identical to nor as extensive as, those contained in the Equal Pay Act. Thus, the amendment was necessary to assure that the exceptions of the earlier statute were not nullified.

The entire discussion of the Bennett Amendment,[16]

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[16] The only other relevant legislative history consists of material that was inserted in the Congressional Record two months before the Bennett Amendment was proposed. Senator Clark, the floor manager of the fair employment provisions, prepared responses to certain "objections" that had been raised concerning the legislation, including one addressing the relationship of the new legislation to the Equal Pay Act. See 110 Cong. Rec. 7212 (1964). Although Senator Clark's response neither contemplates the Bennett Amendment nor speaks to what is "authorized" by the Equal Pay Act, it nonetheless supports our view that Title VII's broad prohibition against compensation discrimination would not "nullify" the standards of the Equal Pay Act for equal work claims brought under Title VII. Indeed, Senator Clark stated that the standards of the earlier statute would continue to apply in "the comparable situation under title VII" (*ibid.*), that is, where litigation could have been brought under either statute, but is brought under Title VII. Thus, Senator Clark's response indicates a proper application of the principle that overlapping statutes should be construed harmoniously, or in pari materia. See 2A C. Sands, *Sutherland Statutory Construction* § 51.05 (4th ed. 1973). It is particularly significant that Senator Clark did not dispute the objectors' contention that Title VII recognizes compensation claims that cut across job lines. Finally, it is ironic that petitioners should construe Senator Clark's remarks as supporting their construction of the Bennett Amendment when he explicitly challenged that construction in 1965. See 111 Cong. Rec. 18261-18263 (1965).

Although petitioners (Pet. Br. 32-41) place undue reliance on the in pari materia principle, rather than looking to the language

from its proposal to its adoption, is as follows (110 Cong. Rec. 13647 (1964)):

> MR. BENNETT. Mr. President, after many years of yearning by members of the fair sex in this country, and after very careful study by the appropriate committees of Congress, last year Congress passed the so-called Equal Pay Act, which became effective only yesterday.
>
> By this time, programs have been established for the effective administration of this act. Now, when the civil rights bill is under consideration, in which the word "sex" has been inserted in many places, I do not believe sufficient attention may have been paid to possible conflicts between the wholesale insertion of the word "sex" in the bill and in the Equal Pay Act.

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and legislative history of Title VII, we note that our construction of the Bennett Amendment also satifies that principle. It is elementary that "when two statutes are capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton* v. *Mancari*, 417 U.S. 535, 551 (1974). As we have shown (pages 13-17, *supra*), our construction preserves the Equal Pay Act in the area which Congress ascribed to it, but fails to extend its rationale to a broader field. Our construction is also consistent with the fact that Congress seems to have considered the Equal Pay Act as only "one of the first steps toward an adjustment of balance in pay for women." 109 Cong. Rec. 9193 (1963) (remarks of Rep. Bolton). See also *id.* at 9205 (remarks of Rep. Sullivan); *id.* at 9193 (remarks of Rep. St. George); *id.* at 9195 (remarks of Rep. Frelinghuysen); *id* at 9196 (remarks of Rep. Thompson); *id.* at 9204 (remarks of Rep. Toll). While it is true that Congress expressed concern in 1963 with the concept of government review of wage rates in situations not involving "equal" work, that concern reflected a general resistance to government involvement in any private employment relationships, a concern that was not present in 1964, when Congress enacted Title VII. See 109 Cong. Rec. 9196 (1963) (remarks of Rep. Frelinghuysen); *id.* at 9197 (remarks of Rep. Goodell). It is likewise instructive, in understanding the relationship of the two statutes, to remember that the Equal Pay Act is part of the Fair Labor Standards Act, a statute with more limited goals than Title VII, and which, unlike Title VII, establishes strict liability. See *Corning Glass Works* v. *Brennan*, 417 U.S. 188, 195-197 (1974).

> The purpose of my amendment is to provide that in the event of conflicts, the provisions of the Equal Pay Act shall not be nullified.
>
> I understand that the leadership in charge of the bill have agreed to the amendment as a proper technical correction of the bill. If they will confirm that understand[ing], I shall ask that the amendment be voted on without asking for the yeas and nays.
>
> MR. HUMPHREY. The amendment of the Senator from Utah is helpful. I believe it is needed. I thank him for his thoughtfulness. The amendment is fully acceptable.
>
> MR. DIRKSEN. Mr. President, I yield myself 1 minute. We were aware of the conflict that might develop, because the Equal Pay Act was an amendment to the Fair Labor Standards Act. The Fair Labor Standards Act carries out certain exceptions. All that the pending amendment does is recognize those exceptions, that are carried in the basic act.
>
> Therefore, this amendment is necessary, in the interest of clarification.

In analyzing the legislative history, two points are significant. First, the Bennett Amendment was proposed and adopted as a "technical" amendment, which was "necessary, in the interest of clarification." It was not represented as a sweeping, substantive amendment affecting the basic coverage of Title VII. Second, the amendment was proposed to assure that in the event of conflicts, there would be no nullification of the exceptions of the Equal Pay Act, which had been enacted "after very careful study by the appropriate committees of Congress." Given the placement of the amendment in Section 703(h), and its description as a "technical" amendment, the "very careful study" to which Senator Bennett alluded must have been the careful consideration that Congress had given to the process of developing the four exceptions contained in the Equal Pay Act.

When the Equal Pay Act was introduced in 1962, the House bill included only the three specific exceptions that

later became the first three exceptions of the Act. See H.R. 11677, 87th Cong., 2d Sess. (1962); H.R.Rep. No. 1714, 87th Cong., 2d Sess. (1962). When the Senate considered the House bill, the bill had been amended to include a fourth general exception, "where [a differential] payment is attributable to ascertainable and specific added costs resulting from the employment of the opposite sex." See 108 Cong. Rec. 22082 (1962). In 1963, both the Senate and House bills contained a general exception for "a differential based on any other factor other than sex," which later became the fourth exception of the Act. See 109 Cong. Rec. [illegible]. 7293, 7848 (1963); S. 1409, and H.R. 6060, 88th Cong., 1st Sess. (1963). When the Senate Committee on Labor and Public Welfare reported S. 1409, it deleted the three specific exceptions and included only the fourth, or general, exception. See S. Rep. No. 176, 88th Cong., 1st Sess. 4 (1963). The Committee Report noted that the three specific exceptions are "valid exceptions" where not based upon sex and that, in addition, "[w]ithout question, employers have other valid classification programs which can justify an exception." The Committee further noted that whether an exception is justified "can only be answered by an ad hoc investigation" (*ibid.*). When the House Committee on Education and Labor reported H.R. 6060, it included both the three specific exceptions and the fourth, or general, exception. See H.R. Rep. No. 309, 88th Cong., 1st Sess. (1963). Much of the floor debate in the House focused on the fourth exception, which had not been discussed in the House during the year before. See 109 Cong. Rec. 9195-9196 (1963) (remarks of Rep. Frelinghuysen); *id.* at 9196 (remarks of Rep. Thompson); *id.* at 9203 (remarks of Reps. Fountain and Griffin); *id.* at 9205-9206 (remarks of Rep. Griffin); *id.* at 9209-9210 (remarks of Rep. Goodell); *id.* at 9217 (remarks of Rep. Findley). The final bill, as enacted, included the three specific exceptions first proposed by the House and a general exception first suggested (109 Cong. Rec. 7293 (1963)) by the Senate. See 29 U.S.C. 206(d).

The substance of Senator Bennett's concern about "nullification" in the event of "conflicts" is clear when considered against this background. As proposed, the first sentence of Section 703(h) [17] included language similar to the first three exceptions of the Equal Pay Act. Like the original House version of the Equal Pay Act, however, the proposed language of Section 703(h) did not contain the general exception that was finally added to the Equal Pay Act. A substantial possibility existed, therefore, that the fourth exception of the Equal Pay Act would be "nullified" in cases in which both statutes applied, if only rough equivalents of the first three exceptions of the Equal Pay Act were contained in Section 703(h). Thus, an employee would be able to bring an equal work claim under Section 703(a), assert that Congress had explicitly reconsidered and revised the exceptions, and accordingly contend that the fourth exception of the Equal Pay Act did not apply. Senator Bennett was obviously concerned that employers might never be able to base employment decisions upon factors "other than sex" itself, that might have a differential impact upon persons of a particular sex. See *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976). Cf. *Corning Glassworks* v. *Brennan*, 417 U.S. 188, 204-205 (1974). The inclusion in Section 703(h) of the four exceptions of the Equal Pay Act satisfied precisely those concerns.[18]

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[17] It is important to recognize that even the first sentence of Section 703(h) was a late addition to the bill, having appeared for the first time when the Mansfield-Dirksen substitute was introduced in the Senate on May 26, 1964. See 110 Cong. Rec. 11926, 11931 (1964). The Bennett Amendment was offered and adopted on June 12, 1964 (*id.* at 13467). The Mansfield-Dirksen substitute passed the Senate on June 17, 1964 (*id.* at 14239).

[18] Petitioners' broader reading of the comments made by Senators Bennett, Dirksen, and Humphrey is unjustified. It is not realistic to believe that Senator Bennett thought that Title VII would "nullify" the equal work standards of the Equal Pay Act with respect to equal work claims brought by women under Title VII. Certainly, the provisions of the two statutes would be harmonized in any event to maintain the same standards with respect to the same claims. No employee could legitimately argue that Con-

The response to Senator Bennett made by Senator Dirksen, one of the principal sponsors of Title VII, also supports our construction.[19] Senator Dirksen's statement suggests that the draftsmen of Title VII had recognized that conflicts might arise between Title VII and the Equal Pay Act. Indeed, Title VII was to be administered and construed by a new agency, while the Equal Pay Act would continue to be administered by the Department of Labor. The earlier statute had "certain exceptions," and the draftsmen of Title VII had "carried" similar exceptions "in the basic [provisions of Title VII]." But, "in the interest of clarification," the Bennett Amendment was necessary to "recognize those exceptions." The meaning of Senator Dirksen's comment is clear and it cannot be brushed aside, as petitioners' suggest (Pet. Br. 61), by speculating that he "may even have been off on a tangent." [20]

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gress had reconsidered and revised the standards for equal work claims under Title VII. Nor is it correct to say that Title VII "conflicts" with the Equal Pay Act simply because Title VII recognizes compensation claims that would not be actionable under the Equal Pay Act. Title VII compensation claims, except in the narrow area of overlap, are different claims based on different acts of discrimination. Finally, it is not realistic to believe that an amendment which, in petitioners' view, deprived one protected class of the right to sue for relief against all but one form of employment discrimination, could properly have been proposed and accepted as a "technical correction."

[19] Likewise, Senator Humphrey's statement indicates his agreement that the amendment was merely a "technical correction." 110 Cong. Rec. 13647 (1964).

[20] Petitioners rely on two additional portions of "legislative history" which, for different reasons, have doubtful value. First, petitioners assert that the statement made by Representative Celler, when the bill was returned to the House, "is entitled to great weight" (Pet. Br. 65). Representative Celler stated that the Bennett Amendment provided "that compliance with the Fair Labor Standards Act as amended satisfies the requirement of the title barring discrimination because of sex—section 703(h) [sic]." 110 Cong. Rec. 15896 (1964). That comment makes sense only if limited (by implication) to the kind of claims that are actionable under the Equal Pay Act. Otherwise, it would mean that women could sue under Title VII only for redress of violations of the

In short, the plain, dispositive fact is that the Bennett Amendment was designed merely to eliminate uncertainty as to the application of the Equal Pay Act exceptions in equal work cases brought under Title VII—and thus to eliminate the possibility of "conflict" between the two Acts (on which the floor discussion of the Bennett Amendment was exclusively focused). There is no evidence that Congress thereby intended to "authorize" all forms of compensation discrimination that were not prohibited by the Equal Pay Act and whose coverage by Title VII would raise no possibility of "conflict" with the Act.

### C. *The Equal Employment Opportunity Commission's Construction of the Bennett Amendment*

The Commission's current guidelines on sex discrimination, which were adopted in 1972, interpret the Bennett Amendment as incorporating in Title VII only the defenses of the Equal Pay Act. See 29 C.F.R. 1604.8 (1979). Petitioners apparently concede (Pet. Br. 89-91) that the current guidelines are clear, and that they fail to support petitioners' construction. But petitioners attempt to show that the current guidelines are inconsistent with the Commission's original understanding, as reflected in its 1965 guidelines and in early statements of its general counsel. The court below properly

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Equal Pay Act, and that they would have no remedy for discrimination in hiring, promotions, transfers, or dismissals. Clearly, that was not the intent of Congress. See also *Los Angeles Department of Water & Power* v. *Manhart*, *supra*, 435 U.S. at 713-714.

Second, petitioners rely (Pet. Br. 61-63) on a statement made by Senator Bennett in 1965 in a floor discussion, not of civil rights legislation, but of the cloture rules, in which he purported to expand on the statement that he had made when proposing the amendment. Senator Bennett's 1965 statement may well reflect his motivation in proposing the amendment, but the Ninth Circuit was clearly correct in noting (Pet. App. 6a) that this statement could not stand as evidence of "what was on Congress' collective mind when it acted a year earlier." Indeed, Senator Clark explicitly challenged the accuracy and validity of Senator Bennett's 1965 statement. See 111 Cong. Rec. 18261-18263 (1965). It is Congress' intent, and not the unexpressed motivation of a particular senator, that must inform the Court's inquiry here.

rejected that argument (Pet. App. 38a), holding that the current guidelines are not inconsistent with the earlier guidelines. Accord, *International Union of Electrical, Radio and Machine Workers, AFL-CIO* v. *Westinghouse, supra*, 631 F.2d at 1105-1106.

Petitioners' argument lacks merit for two reasons. First, petitioners ignore the existence of numerous Commission opinions, beginning in 1966, which are inconsistent with the construction that petitioners seek to attribute to the Commission by virtue of the 1965 guidelines and the early opinions of the general counsel. Second, petitioners' reliance on the early opinions of the general counsel depends in the main on drawing from them a negative implication with respect to matters that the general counsel neither explicitly considered nor addressed.

The Commission has consistently understood the statutory ban on sex-based compensation discrimination to be coextensive with the other prohibitions contained in Section 703(a), and the Commission has always taken the position that those rights under Title VII are not limited to the rights conferred by the Fair Labor Standards Act, as would logically be the case under petitioners' construction. Nothing in the 1965 guidelines is to the contrary.[21] Moreover, the Commission, beginning in 1966, issued a series of decisions that clearly demonstrate that it did not deem a finding of "equal work" necessary to establish a sex-based wage discrimination claim. Decision No. 66-5762, 1973 EEOC Decisions (CCH) ¶ 6001 n.22

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[21] The 1965 guidelines merely recognize the need "to avoid conflicting interpretations or requirements with respect to situations to which both statutes are applicable." 30 Fed. Reg. 14928 (1965). In other words, the guidelines recognize, as did Congress, that Title VII provides a remedy for that type of discrimination which is also actionable under the Equal Pay Act, and that Equal Pay Act standards should apply in that limited area of statutory convergence. That is not to suggest, however, that only cases that could be brought under the Equal Pay Act may be brought under Title VII. Likewise, the guidelines do not suggest that the effect of the Bennett Amendment is to limit the broad definition of discrimination contained in Section 703(a) of Title VII.

(June 20, 1968);[22] Decision No. 70-112, 1973 EEOC Decisions (CCH) ¶ 6108 (Sept. 5, 1969); Decision No. 71-2629, 1973 EEOC Decisions (CCH) ¶ 6300 (June 25, 1971). In these cases, the Commission found that lower pay scales for jobs held predominantly by women in sex-segregated work forces were discriminatory in certain circumstances. Thus, the Commission's current regulations reflect its contemporaneous and long-standing construction of its statute, and are therefore entitled to substantial deference. See *EEOC* v. *Associated Dry Goods Corp.*, No. 79-1068 (Jan. 26, 1981), slip op. 9 n.17.

Petitioners rely (Pet. Br. 81-88) on certain so-called "opinion letters"[23] of the Commission's general counsel, but these letters are not inconsistent with the Commission's guidelines or decisions. In none of these letters did the general counsel specifically address the question whether the Bennett Amendment limited the types of discrimination prohibited by Section 703(a) of Title VII or simply incorporated in Title VII the defenses of the Equal Pay Act. Moreover, even if the opinion letters were susceptible to the construction that petitioners would attribute to them, it is fundamental that opinions by the general counsel or an individual member of the Commission cannot constitute better evidence of the Com-

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[22] In footnote 22, the Commission referred to:

> Commission Decisions finding discrimination based on race or sex where all the incumbents of a particular job classification are Negro or female, and the wage rate for that classification is depressed as compared with comparable work performed by white or male employees in other job classifications or in other plants in the industry.
>
> Commission Decision, issued Apr. 17, 1968, in Case No. AU 7-3-173; and Commission Decision and Supplemental Decision, issued on Aug. 8, and Sept. 16, 1966, respectively, in Case Nos. 5-12-3175 through 5-12-3179.

[23] Although none of the "opinion letters" supports petitioners' position, we disagree with petitioners' view that an informal staff memorandum (Pet. Br. App. 18a-22a) should be thus characterized in any event.

mission's understanding of the statute than do the Commission's own regulations and decisions.[24]

In sum, nothing in any of the early guidelines or opinions under Title VII can fairly be read as a determination that a system of disparate treatment of men and women with respect to compensation, or intentional discrimination in compensation on the basis of sex, is not within the coverage of Section 703(a) of Title VII. Indeed, the Commission's decisions, which are the most authoritative guide available here, are flatly inconsistent with that view.

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[24] Indeed, the Commission has consistently adhered to the position that even materials formally issued as a "written interpretation or opinion" under Section 713(b) of Title VII, 42 U.S.C. 2000e-12(b), "[are] issued to a specific addressee(s) and [have] no effect upon situations other than that of the specific addressee(s)." 35 Fed. Reg. 18692 (1970). Cf. 29 C.F.R. 1601.30 (1966); 29 C.F.R. 1601.33 (1979). At all events, these letters are not entitled to "great weight." In considering a regulation of the Internal Revenue Service that conflicted with an earlier agency interpretation, the Court recently noted that "[c]ontemporaneity * * * is only one of many considerations that counsel courts to defer to the administrative interpretation of a statute." *National Muffler Dealers Ass'n* v. *United States*, 440 U.S. 472, 485 (1979). Other considerations include "the thoroughness evident in its consideration, the validity of its reasoning, [and] its consistency with earlier and later pronouncements * * *." *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 140 (1944). To the extent that language in the letters can be read to support petitioners' construction, that language is in direct conflict with Commission decisions issued as early as 1966 (see pages 25-26, *supra*), which show the Commission did not deem a finding of "equal work" necessary to state a Title VII claim of sex-based wage discrimination. These decisions of the Commission, and not the informal opinion letters of the general counsel, comprise the Commission's reasoned and official interpretation of its statute. Thus, petitioners' reliance on *General Electric Co.* v. *Gilbert*, 429 U.S. 125 (1976), is inapposite.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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